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No. 04-183

In The

Supreme Court of the United States

FRANK IACABONI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether payments to winning gamblers during the operation of an illegal gambling business constitutes the separate offense of promotional money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
A. The Court should resolve the inter-circuit conflict of whether payments to winning gamblers in a gambling business constitutes promotional money laundering	7
1. The court of appeals' opinion conflicts with the Seventh Circuit's holding in *United States v. Scialabba*	8
2. The court of appeals' opinion is inconsistent with the Third Circuit's opinion in *United States v. Conley*	11
B. The court of appeals' interpretation of the money laundering and criminal forfeiture statutes is inconsistent with the canons of statutory construction	12
1. The language that Congress employed when constructing the money laundering and criminal forfeiture statutes indicates that "proceeds" means profits	12

TABLE OF CONTENTS – Continued

Page

2. The court of appeals' decision frustrates Congressional intent to punish money laundering transactions that are separate and distinct from the underlying offense 15

CONCLUSION 18

APPENDIX A – Opinion of the United States Court of Appeals for the First Circuit ..... App. 1

APPENDIX B – Memorandum of Decision of the United States District Court for the District of Massachusetts ..... App. 14

APPENDIX C – Order of United States Court of Appeals for the First Circuit, Denying Petition for Rehearing and Suggestion for Rehearing En Banc ..... App. 43

APPENDIX D – Relevant Provisions of the United States Code ..... App. 45

TABLE OF AUTHORITIES

Page

CASES

Braxton v. United States, 500 U.S. 344 (1991) 7

Jones v. United States, 527 U.S. 373 (1999) 13

Russello v. United States, 464 U.S. 16 (1983) 10

Sanabria v. United States, 437 U.S. 54 (1978) 3

United States v. Bass, 404 U.S. 336 (1971) 17

United States v. Brown, 186 F.3d 661 (5th Cir. 1999) 15, 16, 17

United States v. Butler, 211 F.3d 826 (4th Cir. 2000) 15

United States v. Christo, 129 F.3d 578 (11th Cir. 1997) 15

United States v. Conley, 37 F.3d 970 (3d Cir. 1994) 11, 15, 16

United States v. Conley, 833 F.Supp. 1121 (W.D.Pa. 1993) 11, 12

United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991) 11, 15

United States v. Febus, 218 F.3d 784 (7th Cir. 2000) 6

United States v. Hurley, 63 F.3d 1 (1st Cir. 1995) 6, 9, 10

United States v. Johnson, 971 F.2d 562 (10th Cir. 1992) 11, 17

United States v. LeBlanc, 24 F.3d 340 (1st Cir. 1994) 15

United States v. Murray, 928 F.2d 1242 (1st Cir. 1991) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002), *cert. denied*, 537 U.S. 1071 (2002) ..... *passim*

United States v. Turkette, 452 U.S. 576 (1981) 17

United States v. Wall, 92 F.3d 1444 (6th Cir. 1996) 3

Whalen v. United States, 445 U.S. 684 (1980) 15

STATUTES

Anti-Drug Abuse Amendments Act of 1988, Pub. L. 100-690, § 6463, Tit. VI, Subtit. M, 102 Stat. 4374 (1988) 13

Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H, § 1366(a), 100 Stat. 3707-39 (1986) 2, 13

18 U.S.C. § 981 13

18 U.S.C. § 981(a) 14

18 U.S.C. § 981(a)(1)(D) 14

18 U.S.C. § 981(a)(1)(E) 14

18 U.S.C. § 981(a)(1)(F) 14

18 U.S.C. § 982 ..... 1, 2, 13

18 U.S.C. § 982(a) 2, 7

18 U.S.C. § 982(a)(1) 4, 5, 14

18 U.S.C. § 982(a)(3) 14

18 U.S.C. § 982(a)(4) 14

18 U.S.C. § 982(a)(5) 14

18 U.S.C. § 982(a)(7) 14

18 U.S.C. § 982(a)(8)(B) 14

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1955 ..... 1, 3, 4
18 U.S.C. § 1955(a) 3
18 U.S.C. § 1955(b) 4
18 U.S.C. § 1955(b)(2) 4
18 U.S.C. § 1955(d) 4
18 U.S.C. § 1956 ..... 2, 3
18 U.S.C. § 1956(a)(1) 2, 5, 15
18 U.S.C. § 1956(a)(1)(A)(i) 2, 7, 8, 16
18 U.S.C. § 1956(a)(1)(B) 2
18 U.S.C. § 1956(c)(7)(A) 3
18 U.S.C. § 1957 14
18 U.S.C. § 1961(1) 3
18 U.S.C. § 1963(a)(3) 10
28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

American Heritage College Dictionary (3d Ed.1993) 13
H.R. Rep. No. 855, 99th Cong., 2d Sess., pt. 1 (1986) 14
Merriam Webster's Collegiate Dictionary (10th Ed. 1995) 13
Merriam Webster's Collegiate Thesaurus (1988) 13

PETITION FOR WRIT OF CERTIORARI

Frank Iacaboni respectfully petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit, in *United States v. Iacaboni*, No. 02-2141.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (the "court of appeals") is reported at 363 F.3d 1 (1st Cir. 2004) and is reprinted at App. 1-13. The decision of the United States District Court for the District of Massachusetts (the "district court") is reported at 221 F.Supp.2d 104 (D. Mass. 2002) and is reprinted at App. 14-42. The order of the court of appeals denying Petitioner's petition for rehearing and suggestion for rehearing en banc is unpublished and is reproduced at App. 43-44.

STATEMENT OF JURISDICTION

The court of appeals issued its decision affirming the district court on March 30, 2004. App. 1. The court of appeals denied Petitioner's petition for rehearing and suggestion for rehearing en banc on May 6, 2004. App. 43. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Because the statutory provisions are lengthy, they are reproduced at App. 45-63. This case involves the interrelationship among the criminal forfeiture statute, 18 U.S.C. § 982, App. 45-49, the gambling statute, 18 U.S.C. § 1955,

App. 49-51, and the money laundering statute, 18 U.S.C. § 1956, App. 51-63.

STATEMENT OF THE CASE

1. In 1986, Congress passed the Money Laundering Control Act of 1986, which codified, *inter alia*, the substantive offense of money laundering, 18 U.S.C. § 1956, and the criminal forfeiture statute, 18 U.S.C. § 982. Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H, § 1366(a), 100 Stat. 3707-39 (1986). Under the criminal forfeiture statute, any person who violates the money laundering statute shall forfeit any property involved in the offense. 18 U.S.C. § 982(a).

One way of violating the money laundering statute is by engaging in what has been referred to as "promotional" money laundering. "Promotional" money laundering occurs where a person:

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; * * *

18 U.S.C. § 1956(a)(1).[1]

[1] Section 1956(a)(1)(A)(i) is commonly referred to as the "promotion" prong of the money laundering statute. Section 1956(a)(1)(B) is commonly referred to as the "concealment" prong.

Section 1956 does not contain a definition of the term "proceeds." The absence of a definition is at the heart of Petitioner's case.

"Specified unlawful activity" is defined as "any act or activity constituting an offense listed in [18 U.S.C. § 1961(1)]." 18 U.S.C. § 1956(c)(7)(A). Among the offenses listed in 18 U.S.C. § 1961(1) is the operation of an illegal gambling business in violation of 18 U.S.C. § 1955. 18 U.S.C. § 19[illegible](1).

Section 1955 makes it a crime to "conduct[], finance[], manage[], supervise[], direct[], or own[] all or part of an illegal gambling business." 18 U.S.C. § 1955(a). Section 1955 "does not prohibit gambling *per se*; rather, it punishes those who 'conduct[] . . . an illegal gambling *business*.'" *United States v. Wall*, 92 F.3d 1444, 1449 (6th Cir. 1996) (citation omitted) (emphasis in original). *See also Sanabria v. United States*, 437 U.S. 54, 70 (1978). In defining an "illegal gambling business," Congress began with the presumption of a *business* involved in some form of gambling. A gambling business violates federal law if it:

> **(i)** is a violation of the law of a State or political subdivision in which it is conducted;
>
> **(ii)** involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> **(iii)** has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C. § 1955(b). Section 1955 includes bookmaking as a type of gambling.[2] 18 U.S.C. § 1955(b)(2).

Section 1955 also contains a civil forfeiture provision that authorizes the government to seek money used in an illegal gambling business. *See* 18 U.S.C. § 1955(d). The government chose not to implement Section 1955(d) in this case. App. 35.

2. In 1996 and 1997, Petitioner Frank Iacaboni operated an illegal bookmaking business in and around Leominster, Massachusetts. App. 16. Petitioner's business included offices where agents accepted phone-in wagers from gamblers on sporting events. App. 16-17. In addition, Petitioner's business sold "football tickets," another form of wagering on the outcome of sporting events. App. 19. In either form, Petitioner and/or his agents paid winning gamblers. App. 18. Collectively, these transactions will be referred to as "payments to winning gamblers." Finally, Petitioner compensated the agents who operated the offices and paid office expenses. App. 16-17.

On May 24, 2001, Petitioner was indicted on five counts relating to his operation of an illegal gambling business. App. 1. The Indictment also contained a forfeiture allegation under 18 U.S.C. § 982(a)(1), seeking property involved in money laundering. App. 1. Pursuant to a written plea agreement, Petitioner pled guilty to Counts I-IV of the Indictment and Count I of an Information on March 26, 2002.[3] App. 1. Count IV of the Indictment charged Iacaboni

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[2] Bookmaking is the practice of taking bets on events. *United States v. Murray*, 928 F.2d 1242, 1247 (1st Cir. 1991).

[3] Count V of the Indictment was dismissed.

with conspiracy to commit "promotional" money laundering. App. 15.

In the plea agreement, the parties agreed to a bench trial to determine what was forfeitable under 18 U.S.C. § 982(a)(1) as property involved in "promotional" money laundering. Following the bench trial, the district court ruled that payments made to winning gamblers constituted transactions involving proceeds of an illegal gambling business. App. 27-28. Accordingly, the district court ordered the forfeiture of $350,000, which represented the amount the district court found Petitioner and/or his agents paid out to winning gamblers in 1996 and 1997.[4] App. 40-41.

In reaching its decision, the district court first interpreted the term "proceeds" in Section 1956(a)(1) to mean the "total revenue" generated by specified unlawful activity. App. 27. Based on its "total revenue" interpretation, the district court ruled that Petitioner engaged in a financial transaction involving "proceeds" of his gambling business each time he paid winning gamblers.[5] App. 28. Next, the district court found that these transactions promoted the gambling business because "[n]othing makes an illegal gambling operation flourish more than the

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[4] The district court ordered forfeiture of a total of $384,245. App. 42. The district court also found that during the relevant time period, Petitioner: (1) paid $16,750 in salaries and expenses; (2) repaid a $10,000 loan in a cash payment consisting of some money derived from the illegal gambling business; and (3) deposited $7,495 in checks from a gambler with the intent to conceal their nature. App. 42. The court of appeals reversed the order with respect to the checks. App. 13.

[5] The district court also ruled that the salaries of agents and payments for business expenses also constituted promotional money laundering. App. 28.

prompt payment of winners." App. 32. Accordingly, the court concluded that paying winning gamblers violated the "promotion" prong of the money laundering statute. App. 32.

In his proposed findings and rulings, Petitioner had requested an interpretation of "proceeds" as "net profits," citing the Seventh Circuit's decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), *cert. denied*, 537 U.S. 1071 (2002).[6] The district court, however, specifically rejected the *Scialabba* Court's holding, opining that under the Seventh Circuit's interpretation, "one could argue that so long as the illegal enterprise had no net profit, no money laundering prosecution would be possible." App. 27.

3. Petitioner appealed the forfeiture order to the court of appeals, primarily on the issue of whether payments to winning gamblers constituted promotional money laundering. Like the district court, the court of appeals rejected Petitioner's argument that the ruling in *Scialabba* should be followed, affirming the district court's ruling that payments to winning gamblers constituted a transaction in "proceeds." App. 7. For its conclusion, the court of appeals relied on its holding in *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995), wherein the First Circuit adopted a broad interpretation of "proceeds" as the term is used in the RICO forfeiture statute. App. 7.

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[6] In ruling that payments to winning gamblers amounted to promotional money laundering, the district court cited an earlier Seventh Circuit decision in *United States v. Febus*, 218 F.3d 784 (7th Cir. 2000), which stated that payments to winning players of a bolita "promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage." *Id.* at 790.

The court of appeals then concluded that payments to winning gamblers are intended to promote an illegal gambling business, basing its conclusion on the district court's rationale. App. 8. The court of appeals added that payouts to winning gamblers are the type of "cash-generating scheme[]" that Congress intended to proscribe when it passed the money laundering statute. App. 10.

4. Petitioner petitioned to the First Circuit for a panel rehearing and suggested a rehearing en banc primarily on the ground that the decision created a clear inter-circuit conflict with the Seventh Circuit. The First Circuit denied the petition on May 6, 2004. App. 44.

REASONS FOR GRANTING THE PETITION

A. The Court should resolve the inter-circuit conflict of whether payments to winning gamblers in a gambling business constitutes promotional money laundering.

The Court should grant the petition because this case presents a clear inter-circuit conflict concerning the meaning of an important and increasingly utilized federal statute. *Braxton v. United States*, 500 U.S. 344, 347 (1991) (stating principle purpose of granting certiorari is to resolve inter-circuit conflicts concerning the meaning of federal laws). The question presented seeks to resolve a conflict with respect to the proper interpretation of the "promotion" prong of the money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i), and its impact on the criminal forfeiture statute, 18 U.S.C. § 982(a). Under the First Circuit's interpretation, every participant in an illegal gambling business will always violate the "promotion"

prong of the money laundering statute, because every gambling business pays its winning gamblers. Under the Seventh Circuit's interpretation, payments to winning gamblers do not constitute "promotional" money laundering. In the Seventh Circuit, only persons conducting transactions with the "net profits" of a gambling business, with the intent to promote the business, run afoul of the money laundering statute.

1. The court of appeals' opinion conflicts with the Seventh Circuit's holding in *United States v. Scialabba*.

The court of appeals' decision created a clear inter-circuit conflict with the Seventh Circuit's holding that "proceeds" in the money laundering statute means "net profits," rather than gross income or receipts. *Scialabba*, 282 F.3d at 475. In both the district court and the court of appeals, Petitioner sought an interpretation of § 1956(a)(1)(A)(i) that was consistent with *Scialabba*. Both courts, however, rejected the ruling in *Scialabba* in favor of an interpretation that "proceeds" refers to total revenue. App. 6-7; App. 27.

The defendants in *Scialabba* were convicted under § 1956(a)(1)(A)(i) based on transactions made while operating an illegal gambling business. *Id.* There, the defendants provided video poker machines to various establishments. *Id.* The defendants would split the money from the video machines with the owners of the establishments. *Id.* at 476. The splits were intended, *inter alia*, to reimburse the owners for payments the owners made to winning gamblers. *Id.*

In vacating the defendants' money laundering convictions, the *Scialabba* Court rejected the government's argument that "proceeds" means gross income or receipts. *Id.* at 477. The court observed that no definition existed within the statute to support such a broad interpretation. *Id.* Moreover, a common understanding of the word "proceeds" would lead one to the narrower "net profits" interpretation. *Id.* Had Congress intended otherwise, "[i]t would have been easy enough to write 'receipts' in lieu of 'proceeds' in § 1956(a)(1)." *Id.*

The *Scialabba* Court observed that reading the statute as seeking gross income or receipts would result in situations where a violation of one statute necessarily violates another. *Id.* That is, the offense of money laundering would merge with the specified unlawful activity. *Id.* at 475. By interpreting "proceeds" to mean net profits, the court avoided this overlap and ensured that the gambling statute and the money laundering statute applied to separate and distinct "steps in a criminal enterprise." *Id.* at 477.

In rejecting *Scialabba*, the court of appeals relied on its previous interpretation of "proceeds" in *Hurley*, 63 F.3d at 21, a case that addressed the term within the context of the RICO forfeiture statute and examined the legislative history behind it. App. 7. The court of appeals stated that Petitioner offered no reason to depart from its holding in *Hurley*. App. 7. *Hurley*, however, is inapposite to Petitioner's case.

Hurley stands for the proposition that in the RICO forfeiture statute, 18 U.S.C. § 1963(a)(3)[7], the term "proceeds" should be interpreted broadly. Hurley did not involve the substantive money laundering statute at issue here. Moreover, the *Hurley* Court's basis for its interpretation was the legislative intent behind the RICO forfeiture statute. The *Hurley* Court cited this Court's directive in *Russello v. United States*, 464 U.S. 16, 27 (1983), that RICO be treated differently in light of Congress' "unusual command" to interpret RICO broadly.[8] *Hurley*, 63 F.3d at 21. Congress, however, did not issue an "unusual command" when it created the money laundering statute two years after the RICO forfeiture statute.

Thus, *Scialabba*, not *Hurley*, presented a case directly on point with Petitioner's.

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[7] Section 1963(a)(3) make forfeitable "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity. . . . "

[8] *Russello* did not actually define the term "proceeds." Indeed, *Russello* stated:

> In our ruling today, we recognize that we have not resolved any ambiguity that might be inherent in the terms "profits" and "proceeds." Our use of those terms is not intended to suggest a particular means of calculating the precise amount that is subject to RICO forfeiture in any given case. We hold simply that the "interests" subject to forfeiture under § 1963(a)(1) are not limited to interests in an enterprise.

Russello, 464 U.S. at 27, n.3.

2. The court of appeals' opinion is inconsistent with the Third Circuit's opinion in *United States v. Conley*.

The court of appeals' decision is also inconsistent with the Third Circuit's decision in *United States v. Conley*, 37 F.3d 970 (3d Cir. 1994), which seemingly falls in line with *Scialabba*. Like *Scialabba*, *Conley* involved a gambling business that distributed video poker machines. *Id.* at 972. The *Conley* Court stated that "proceeds" constituted the money collected from the poker machines. *Id.* at 980. *Conley* agreed with the Tenth Circuit that there must be some distinction between the specified unlawful activity and the financial transactions. *Id.* at 979. *See United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992); *United States v. Edgmon*, 952 F.2d 1206, 1214 (10th Cir. 1991).

The notable factual distinction in *Conley* is that, unlike *Scialabba* where the owners of establishments paid winners and were later reimbursed, the video machines in *Conley* paid winning gamblers directly. *See United States v. Conley,* 833 F.Supp. 1121, 1127 (W.D.Pa. 1993). The questioned transactions involved the profits left in the machine after payouts. *Conley*, 37 F.3d at 980. The *Conley* Court held that the transactions could violate the promotion prong of the money laundering statute because they were for services that were not necessary to the gambling business, such as purchasing more video machines, paying employees, and servicing machines. *Id.* at 979 (stating promotional transactions are those unnecessary to conducting an illegal gambling business). Thus, while *Conley*, did not address directly the issue of paying winning gamblers, it endorsed the concept that limiting promotional money laundering to acts committed after the

underlying offense is completed is what Congress sought to punish. *Id.* at 980.

By holding that payments to winning gamblers in a gambling business amounts to promotional money laundering, the First Circuit departed from the decisions of its sister Circuits and created a clear conflict in the application of a federal statute. Defendants convicted in the First Circuit of both operating an illegal gambling business and money laundering will now be punished differently from persons convicted of identical offenses in other Circuits. Had Petitioner been convicted in the Seventh Circuit, and likely the Third Circuit, he would not have been ordered to forfeit $350,000. In the interests of justice, the Court should settle this conflict.

B. The court of appeals' interpretation of the money laundering and criminal forfeiture statutes is inconsistent with the canons of statutory construction.

As a matter of statutory construction, the court of appeals' decision defies the plain language of the statute and frustrates Congressional intent in creating the substantive offense of money laundering.

1. The language that Congress employed when constructing the money laundering and criminal forfeiture statutes indicates that "proceeds" means profits.

While the money laundering statute lacks a definition of "proceeds", an examination of the ordinary meaning of "proceeds", together with the context in which the term was

used, demonstrates that "proceeds" was intended to mean profits.

The ordinary understanding of "proceeds" is that the term refers to profits. The American Heritage College Dictionary defines "proceeds" as "[t]he amount of money derived from a commercial or fundraising venture; *the yield.*" *American Heritage College Dictionary* 1090 (3d Ed. 1993) (emphasis added). Merriam Webster defines "proceeds" as "the net amount received . . . after deduction of any discount or charges." *Merriam Webster's Collegiate Dictionary* 929 (10th Ed. 1995). Most telling of all is Merriam Webster's Thesaurus, which lists synonyms for "proceeds" as "profits, earnings, gain, lucre, return." *Merriam Webster's Collegiate Thesaurus* 579 (1988).

"Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999). The original text of 18 U.S.C. § 982, as well as its civil forfeiture counterpart, 18 U.S.C. § 981, utilized the term "gross receipts," not "proceeds," to describe forfeitable property.[9] Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H, § 1366(a), 100 Stat. 3707-39 (1986). Congress later amended both statutes and substituted the phrase "property . . . involved in [money laundering] . . . " which, of course, meant the "proceeds of some form of specified unlawful activity." Anti-Drug Abuse Amendments Act of 1988, Pub. L. 100-690, § 6463, Tit. VI, Subtit. M, 102 Stat. 4374, 4375 (1988). Under the 1988 amendment, Congress

[9] The original text of both statutes authorized forfeiture of "any property, real or personal, which represents the gross receipts a person obtains. . . ." Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H, § 1366(a), 100 Stat. 3707-39 (1986).

continued to use the terms "gross receipts" and "gross proceeds" in both the civil and criminal forfeiture statutes as applied to other designated crimes.[10] *See, e.g.*, 18 U.S.C. § 981(a)(1)(D) & (E) ("gross receipts"); 18 U.S.C. § 981(a)(1)(F) ("gross proceeds"); 18 U.S.C. § 982(a)(1),(3),(4) ("gross receipts"); 18 U.S.C. § 982(a)(1),(5),(7), (8)(B) ("gross proceeds"). The fact that Congress did not alter "proceeds" in 1988 provides strong guidance that "proceeds" was intended to mean profits.

Where Congress intends a meaning beyond the ordinary understanding of "proceeds" it includes a provision broadening the term, as it did in the civil forfeiture statute, stating:

> **(2)** For purposes of paragraph (1), the term "proceeds" is defined as follows:
>
> **(A)** In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

18 U.S.C. § 981(a).

Congress was well aware of the ordinary understanding of "proceeds" when it enacted the substantive money

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[10] The use of the term "gross receipts" in 18 U.S.C. § 1957 was explained in a House of Representative Report on September 19, 1986.

> The term "gross receipts" was used in this provision to indicate that expenses or overhead incurred by the money launderer are not to be subtracted from the forfeitable "commission."

H.R. Rep. No. 855, 99th Cong., 2d Sess., pt. 1 (1986).

laundering and forfeiture statutes. It took no steps to expand or clarify the term in Section 1956(a)(1). Nor did Congress use the terms "gross proceeds" or "gross receipts" in Section 1956(a)(1). As the *Scialabba* Court opined, if Congress had intended "proceeds" to encompass "gross proceeds" or "gross receipts," it would have used specific language. *See Scialabba*, 282 F.3d at 477.

2. The court of appeals' decision frustrates Congressional intent to punish money laundering transactions that are separate and distinct from the underlying offense.

Congressional intent in the enactment of the money laundering statute also suggests that "proceeds" should be read as profits. Congress intended the money laundering statute to create a "separate crime distinct from the underlying offense that generated the money." *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994). The statute was intended to fill the gap between the underlying offenses and "the post-crime hiding of ill-gotten gains." *Id.* It was not intended to create an alternative means of punishing participants of an illegal gambling business. *United States v. Butler,* 211 F.3d 826, 829 (4th Cir. 2000); *United States v. Brown*, 186 F.3d 661, 670 (5th Cir. 1999); *United States v. Christo,* 129 F.3d 578, 579 (11th Cir. 1997); *Conley*, 37 F.3d at 980; *LeBlanc*, 24 F.3d at 346; *United States v. Edgmon*, 952 F.2d 1206, 1214 (10th Cir 1991). *See also Whalen v. United States*, 445 U.S. 684, 692 (1980) ("Congress ordinarily does not intend to punish the same offense under two different statutes.").

The court of appeals' decision in this case is contrary to Congressional intent because it has interpreted the money laundering statute in such a way that every person

convicted of operating an illegal gambling business will necessarily violate the promotional prong of the money laundering statute. *See Scialabba*, 282 F.3d at 477 (questioning appropriateness of convictions for multiple offenses when "transactions that violate one statute necessarily violate another"). The court of appeals has, in effect, declared that payments to winning gamblers are transactions unnecessary to the operation of a gambling business, because only then can those transactions be intended to promote the business. *See Conley*, 37 F.3d at 21. Yet the *sine qua non* of a gambling *business*, as opposed to individual acts of gambling, is payments to winners. The district court conceded as much when it stated, "paying winners is obviously part and parcel of the crime of operating an illegal gambling business." App. 31.

Although the court of appeals recognized this dilemma, it rejected *Scialabba* based on the notion that the separate elements required by each statute avoided any overlap of offenses. App. 9. But in holding that Petitioner promoted his gambling business by paying winning gamblers, the court of appeals eviscerated the one element that Congress included in the money laundering statute to avoid a merging of offenses – specific intent. Specific intent is the one element that separates the money laundering offense from the underlying offense, thereby accomplishing the Congressional objective to create a separate and distinct crime.

Section 1956(a)(1)(A)(i) makes specific intent to promote a necessary element of promotional money laundering. *Conley*, 37 F.3d at 979. Absent direct proof of specific intent, the charged transaction must demonstrate intent on its face, such as the purchase of beepers in a drug conspiracy. *Brown*, 186 F.3d at 670-71. "This element

is not satisfied by mere evidence of promotion, or even knowing promotion, but requires evidence of *intentional* promotion." *Id.* at 670 (emphasis in original).

No evidence was presented regarding Petitioner's specific intent to promote the gambling business. Nor does payment to winning gamblers demonstrate intent to promote a gambling business on its face. Payments to winning gamblers are no more promotion than delivering a vehicle promotes a car sales business. Rather, these transactions are part and parcel of the business. They are undertaken because the business cannot exist without them.

In sum, given the plain language used in the money laundering statute and the legislative intent behind its creation, the term "proceeds" should be interpreted as meaning profits. The rule of lenity requires such a result. *United States v. Turkette*, 452 U.S. 576, 587, n.10 (1981); *See United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992) (stating plain language of § 1957 and its legislative history requires application of rule of lenity). The rule is applied "at the end of the process of construing what Congress has expressed" to help resolve any ambiguity. *Turkette*, 452 U.S. at 587, n.10. "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347-348 (1971).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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363 F.3d 1

United States Court of Appeals,
First Circuit.

UNITED STATES, Appellee,
v.
Frank IACABONI, Defendant, Appellant.

No. 02-2141.

Heard April 9, 2003.
Decided March 30, 2004.

Thomas J. Butters, with whom Butters, Brazilian & Small LLP, was on brief, for appellant.

Andrew Levchuk, Assistant U.S. Attorney, with whom *Michael J. Sullivan*, was on brief, for appellee.

Before *BOUDIN*, Chief Judge, *LYNCH* and *HOWARD*, Circuit Judges.

HOWARD, Circuit Judge.

In March 2002, Frank Iacaboni pleaded guilty to charges arising out of his operation of an illegal gambling business. He appeals the district court's subsequent forfeiture order, contending that the court erred in its determination that $384,245 should be forfeited. Concluding that the district court's reasoning is sound as to the bulk of the award, we affirm in part, but reverse and remand as to one category of funds included in the forfeiture.

I. Factual and Procedural Background

From 1995 through March 1998, Iacaboni conducted an illegal sports gambling operation in and around Leominster, Massachusetts. Iacaboni's business included a few

different "offices" headed by individuals hired to take bets from gamblers over the telephone. Iacaboni also ran a "football ticket" business; bettors paid between $1 and $10 per "ticket," a card on which they checked off four or more predictions in dozens of upcoming games.

In May 2001, a grand jury indicted Iacaboni on charges of conspiracy to conduct an illegal gambling business (Count I), 18 U.S.C. § 371; operating an illegal gambling business (Count II), 18 U.S.C. § 1955; conspiracy to conduct an illegal gambling business involving interstate travel (Count III), 18 U.S.C. § 371; conspiracy to launder money from 1995 to March 1998 (Count IV), 18 U.S.C. § 1956(h); and money laundering on December 23, 1997 (Count V), 18 U.S.C. § 1956(a)(1)(A)(i). The indictment also included forfeiture allegations seeking "any property, real or personal, involved in" Iacaboni's violations of 18 U.S.C. § 1956. 18 U.S.C. § 982(a)(1). At his arraignment, Iacaboni entered a plea of not guilty on all charges.

On March 26, 2002, Iacaboni changed his plea to guilty on Counts I through IV of the indictment, and the government agreed to dismiss Count V. Iacaboni also pleaded guilty to a criminal information charging him with money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) in connection with the December 23, 1997 transaction that had been the subject of Count V.[1]

[1] The December 23, 1997 transaction involved an attempted transfer of $10,000 to an individual the government alleged to be an organized crime figure. *United States v. Iacaboni*, 221 F.Supp.2d 104, 109-10, 117 (D.Mass.2002). Because Iacaboni does not contest the

(Continued on following page)

In April 2002, the court held a bench trial on the forfeiture allegations. The government presented the testimony of two of Iacaboni's employees, Robert Bolaski and Ryan Gallagher. They described their day-to-day duties, the size of their typical client roster (40 to 50 for Bolaski, and 15 to 20 for Gallagher), and their weekly salaries (ranging from $300 to $350). Bolaski estimated that Iacaboni's business might owe approximately $15,000 to $20,000 to winning bettors during a bad week, and expect to collect $20,000 to $25,000 from losing bettors during a good week. Gallagher testified that his office paid out an average of approximately $10,000 per week to winning bettors over the course of a seventeen-week football season. Both Bolaski and Gallagher testified that the volume of betting varied.

Larry Landman, one of Iacaboni's bettors, also testified at trial. He testified that he bet every weekend during football season, and that occasionally when he owed money to Iacaboni, he would send "personal checks" made out to the defendant.[2] He sometimes made the notation "personal loan" on the checks, a practice that was his own idea, not one suggested by Iacaboni. Iacaboni deposited Landman's checks into his personal account. The government presented evidence of nineteen checks given to Iacaboni by Landman, only nine of which were relevant to

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inclusion of these funds in the forfeiture order, the details of this transaction are not recounted here.

[2] These payments were technically made by personal money order, but were commonly referred to by the parties as "checks." Because the distinction is insignificant in our analysis, we adopt the "check" label used below.

the forfeiture analysis because of the applicable five-year statute of limitations. These nine checks, deposited between May 1996 and December 1996, totaled $7,385.[3]

The court also heard testimony from Robert Davies, an agent of Iacaboni's, and Tina LeClair, Iacaboni's former girlfriend. These witnesses, along with Bolaski, described the operation of the football ticket business, including how bets were placed and winnings distributed.

In June 2002, Iacaboni was sentenced to ten months in custody, a fine of $30,000, and three years' supervised release. The district court heard argument on the forfeiture allegations soon thereafter. In August 2002, the district court ordered Iacaboni to forfeit $384,245 pursuant to 18 U.S.C. § 982(a)(1). This amount included (1) $340,000 in funds paid to winning phone-in bettors over the 1996 and 1997 football seasons; (2) $10,000 in funds paid to winning football ticket bettors; (3) $10,000 representing funds involved in the December 23, 1997 transaction; (4) $7,495 in checks from Landman; (5) $16,150 in salaries; and (6) $600 in phone expenses.[4] The district court declined to order that Iacaboni forfeit his residence

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[3] The district court found that the government had presented evidence of twenty-one checks, ten of which fell within the statute of limitations and totaled $7,495. *Iacaboni*, 221 F.Supp.2d at 108. Our review of the record reveals that evidence of only nineteen transactions was introduced by the government, and that the district court mistakenly counted a $110 cash deposit as a tenth "check" in its calculation of amounts paid by Landman.

[4] On appeal, Iacaboni does not contest the forfeitability of items (3) and (6), the $10,000 in funds transferred on December 23, 1997, *see* n. 1, above, and the $600 in phone expenses.

in Leominster, a penalty sought by the government.[5] This appeal followed.

II. Analysis

Iacaboni contends that the district court erred in its determination of the amount to be forfeited because (1) the payouts to winning bettors were integral to the illegal gambling business and therefore could not be considered property involved in money laundering; (2) there was insufficient evidence to support a finding that $340,000 was paid out to phone-in bettors; and (3) the Landman checks were not property involved in money laundering.

A. *Payments to Winning Bettors*

We review de novo the district court's determination of what constitutes forfeitable proceeds under 18 U.S.C. § 1956(a)(1)(A)(i). The court found that $350,000, an amount representing payments to winning bettors, should be forfeited.[6] The statute provides:

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[5] The government had argued that the property was subject to forfeiture under 18 U.S.C. § 1956. The district court disagreed, concluding that "it is not enough merely to show that the Union St. property was involved in the gambling operation; the Government must demonstrate that the house was involved in money laundering." *Iacaboni*, 221 F.Supp.2d at 116. Although the government initially cross-appealed, *United States v. Iacaboni*, No. 02-2259, that appeal was later voluntarily dismissed.

[6] Although the forfeiture of funds a defendant has transferred away may seem an unusual concept, detailed statutory provisions have been designed to accomplish this very end in drug and money laundering cases, and the defendant has not argued that these provisions are inapplicable. *See* 18 U.S.C. §§ 982(a), (b)(1); 21 U.S.C. § 853(p).

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity;
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater[.]

18 U.S.C. § 1956.[7]

Looking to the language of the statute, we first consider whether the payments to winning bettors constituted financial transactions involving the proceeds of illegal gambling, a specified unlawful activity. *Id.* § 1956(a)(1). The district court concluded that this portion of the statute had been satisfied, noting the breadth of the terms "financial transaction" and "proceeds." *Iacaboni,* 221 F.Supp.2d at 111-12.

Iacaboni does not contest his participation in "financial transactions," but he does argue that "proceeds" refers to net income of the illegal gambling operation, not payouts, citing *United States v. Scialabba,* 282 F.3d 475 (7th Cir.2002), *cert. denied,* 537 U.S. 1071, 123 S.Ct. 671, 154

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[7] Section 1956(a)(1)(A)(i) prohibits conduct sometimes referred to as "promotional" money laundering. Unlike "concealment" money laundering (*i.e.* financial transactions designed to conceal the source of the funds or to avoid transaction reporting requirements), which is governed by 18 U.S.C. § 1956(a)(1)(B), an intent to conceal is not an element of the crime.

L.Ed.2d 565 (2002). There, the Seventh Circuit held that money paid to winning players in an illegal video poker scheme could not be considered proceeds, defining proceeds as net profits. We have previously rejected Iacaboni's interpretation of the term "proceeds" in the RICO forfeiture context. *See United States v. Hurley,* 63 F.3d 1, 21 (1st Cir.1995) (quoting legislative history of RICO forfeiture provisions for the proposition that "the term 'proceeds' has been used in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits"). Iacaboni has offered no rationale for abandoning that approach here.

Concluding that Iacaboni's financial transactions involved "proceeds" within the meaning of § 1956(a)(1), we turn to whether the transactions were intended to promote the gambling operation. Iacaboni asserts that payments to winning bettors cannot be considered "promotion" because these payments were an integral part of the illegal gambling business. Defining payouts as promotion, Iacaboni contends, is an impermissible alternative punishment for operating a gambling business. He argues for an interpretation of the statute that would require an additional promotional step beyond the mere operation of the illegal venture.

In addressing this argument, the district court opined that the payouts were not typical examples of promotion money laundering (such as the "plowing back" or reinvestment of criminal proceeds through the payment of business expenses, *see* B. Frederic Williams, Jr. & Frank D. Whitney, Federal Money Laundering: Crimes and Forfeitures 137-39 (1999)). The court also opined that, under the logic advanced by the government, "*any* illegal gambling operation would also be a money laundering

operation." *Iacaboni,* 221 F.Supp.2d at 113. But the court nevertheless concluded that the transactions fell within the reach of § 1956(a)(1)(A)(i), in part because "[n]othing makes an illegal gambling operation flourish more than the prompt payment of winners," *id.* at 114 (citing *United States v. Febus,* 218 F.3d 784, 790 (7th Cir.2000)), and in part because it was not "fundamentally unfair to view as money laundering the conduct of defendant that took the proceeds of his illegal business and used them to increase the popularity and viability of his criminal operation by paying his winners." *Id.*

We agree with the district court, and affirm on the grounds set forth in its opinion, as well as the following considerations. Crimes such as the operation of an illegal gambling ring create huge sums of cash, the use or disposition of which can prove problematic for illegal gambling operators who wish to stay beneath the radar of law enforcement agencies. Depositing the funds with a financial institution can trigger currency transaction reporting requirements, *see Hurley,* 63 F.3d at 12 (citing 31 U.S.C. § 5313), which in turn can bring the depositor the unwanted attention of the Internal Revenue Service or other government agencies.

Criminals dealing in large amounts of cash who wish to avoid the risks and practical difficulties of "putting it in the mattress" have thus developed strategies to avoid the creation of a paper trail that can lead to apprehension. They frequently "structure" their cash deposits so as to avoid reporting requirement triggers, *see United States v. Saccoccia,* 58 F.3d 754, 762 n. 1 (1st Cir.1995) (describing subdivision of cash into "smaller, unreportable amounts," a process also known as "smurfing"); use the cash to purchase valuables, *see id.* (recounting scheme whereby

proceeds from Columbian drug cartel were laundered through purchases of gold); and use the cash to promote, or "move forward," Webster's Third New International Dictionary 1815 (1993), the unlawful scheme by which the cash was derived or another unlawful scheme, *see United States v. London,* 66 F.3d 1227, 1242-43 (1st Cir.1995) (upholding money laundering conviction of operator of check-cashing business whose intentional failure to file currency transaction reports benefitted his bookmaking clientele). Recognizing the prevalence of these evasionary strategies, Congress in 1986 enacted § 1956 to outlaw (1) the structuring of financial transactions so as to avoid currency reporting requirements or to conceal the source of the funds, and (2) the promotion of unlawful activity through financial transactions involving the proceeds of a specified unlawful activity (of which running an unlawful gambling operation is one, *see United States v. LeBlanc,* 24 F.3d 340, 346 (1st Cir.1994)). Thus the statute's two "prongs." *See* n. 7, above.

In our view, Iacaboni misses the point in asserting that defining the payouts as promotion would constitute an impermissible alternative punishment for an act that is an integral component of an unlawful gambling business.[8]

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[8] Of course, as we read the statutes, a gambling operation and money laundering will often occur together but each requires an element that the other does not, *United States v. Conley,* 37 F.3d 970, 978-79 (3d Cir.1994), thereby satisfying the *Blockburger* test. *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). We do not share the Seventh Circuit's doubts on this issue expressed in *United States v. Scialabba,* 282 F.3d 475, 477 (7th Cir.2002). There might, of course, be concerns if the government sought to forfeit the same property twice, but that is not a problem presented in this case. *Cf. United States v. Cunan,* 156 F.3d 110, 116 (1st Cir.1998).

Targeting the payouts reflects the decision of Congress (embodied in § 1956) to proscribe not only certain unlawful cash-generating schemes, but also the means by which they are practically carried out and hidden from investigators. *See LeBlanc,* 24 F.3d at 346 ("Congress intended to criminalize a broad array of transactions designed to facilitate numerous federal crimes, including illegal gambling."). Such a proscription empowers law enforcement to combat such schemes not only from a direct operational perspective, but also from the more indirect financial angle. Viewed in this light, the district court's decision to forfeit the payouts to winning gamblers is consonant with the purposes for which Congress enacted 18 U.S.C. § 1956(a)(1)(A)(i).[9] We hasten to add that we are only deciding whether the facts of this case come within the term "promote" as used in this statute, and not as that term may have been used by Congress elsewhere in federal law.

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[9] In his brief, Iacaboni ends his argument regarding the improper characterization of payouts as promotion with the statement: "For the same reason, the Court should also vacate the District Court's forfeiture order as it pertains to the $16,150 in salaries paid to agents." Iacaboni Br. at 22-23. Even if we consider this issue despite Iacaboni's failure to brief it properly, *see United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990), the argument has no merit. The payment of salaries of employees is a common example of promotion within the meaning of the statute. *See Febus,* 218 F.3d at 790; *United States v. Leonard,* 61 F.3d 1181, 1186 (5th Cir.1995); *see also* B. Frederic Williams, Jr. & Frank D. Whitney, Federal Money Laundering: Crimes and Forfeitures 137 (1999) ("A manufacturer of cars would think it strange if one asserted that the payment of wages for its workers on the assembly line and for steel or other raw materials were not intended to help promote the company's continuation and success in the car industry."). We uphold the district court's finding that $16,150 in salaries is subject to forfeiture.

B. *Calculation of Amount of Payments to Winning Phone-In Bettors*

Iacaboni contends that even if the payments to winning bettors are properly characterized as promotion money laundering and thus forfeitable, the district court erred in calculating the amounts paid to winning phone-in bettors. The court found that Gallagher testified credibly that his office paid out an average of approximately $10,000 per week during the seventeen-week football season. The court concluded therefore that approximately $170,000 was paid out during each football season, totaling $340,000 over the course of two years. This calculation was based on Gallagher's office only,[10] and did not include bets on the playoffs or the Super Bowl. Likewise, it included only wagers on football games, although the Iacaboni operation also took bets on baseball, hockey and basketball.

The district court's factual findings regarding the amounts paid to winning phone-in bettors are reviewed for clear error. *See United States v. 15 Bosworth Street,* 236 F.3d 50, 53 (1st Cir.2001) (noting, in civil forfeiture context, that "the appellate process ought to respect the trial judge's superior feel for the case and his enhanced ability to weigh and evaluate conflicting evidence" (internal quotation omitted)). The findings were based in part on a credibility determination to which we extend great deference, and in part on commonsense extrapolation. We conclude that the district court's findings were sound in

[10] The district court heard testimony that there were at least three offices in addition to Gallagher's within the Iacaboni operation.

light of the small segment of Iacaboni's business on which they were based. Indeed, the amount ordered forfeited appears to be a reasonable and fair estimate.

C. *Landman Checks*

Iacaboni contests the district court's finding that $7,495 in checks Landman paid to Iacaboni were forfeitable, alleging that the court improperly relied on a theory of concealment money laundering, 18 U.S.C. § 1956(a)(1)(B)(i), when Iacaboni pleaded guilty only to promotion money laundering. *Id.* § 1956(a)(1)(A)(i). The government concedes that a variance occurred, but contends that it did not affect Iacaboni's substantial rights.[11]

Here, the indictment alleged promotion money laundering, Iacaboni pleaded guilty to promotion money laundering, but – to the extent the Landman checks are included in the forfeiture – the sentence was based on a *concealment* money laundering theory. *See Iacaboni,* 221 F.Supp.2d at 117 ("[T]he court finds that the defendant's purpose in depositing these funds in his general bank

[11] The government also argues that the issue was not preserved on appeal, and should therefore be subject only to plain error review. We do not agree. In his proposed findings of fact and conclusions of law submitted prior to sentencing, Iacaboni contended that the government had not charged any form of money laundering on the basis of Landman's checks. *See* Def's. Proposed Findings of Fact and Conclusions of Law No. 28. Iacaboni urged the district court to find that "[n]othing about these checks suggests that they were involved in a money laundering transaction. Indeed, the government has not even suggested that they were money laundering transactions, as they were not so charged in the Indictment." *See* Def's. Proposed Findings of Fact and Conclusions of Law No. 61.

account was to conceal their illegal nature. Commingling tainted funds with legitimate funds 'for the purpose of concealing the nature or source of the tainted funds' constitutes concealment money laundering" (citation omitted)). The district court's forfeiture of the Landman checks on the basis of concealment money laundering, a charge that the government conceded at oral argument was not included in Count IV of the indictment, effectively altered the terms of the indictment. This alteration is a per se prejudicial "constructive amendment." *See United States v. Fisher*, 3 F.3d 456, 462-63 (1st Cir.1993) ("A constructive amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecution or court after the grand jury has last passed upon them." (internal quotation omitted)). Accordingly, we reverse the district court order to the extent the Landman checks are included in the forfeiture.[12]

III. Conclusion

For the foregoing reasons, we *affirm* the district court's order of forfeiture but *reverse* and *remand* to the extent that the Landman checks are included in the forfeiture.

It is so ordered.

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[12] We decline the government's invitation to affirm on the alternative ground, adverted to only in passing in its brief, that the depositing of the checks constituted promotion money laundering. The government has not identified any portion of the record that would justify such a conclusion by this court or any further consideration of the issue on remand.

221 F.Supp.2d 104

United States District Court,

D. Massachusetts

UNITED STATES of America,

v.

Frank IACABONI, Defendant.

No. CRIM.A.01-30025-MAP.

Aug. 13, 2002.

Andrew Levchuk, United States Attorney's Office, Springfield, MA, for U.S.

Thomas J. Butters, Butters, Brazilian & Small, L.L.P., Boston, MA, for Frank Iacaboni.

MEMORANDUM OF DECISION

PONSOR, District Judge.

I. *INTRODUCTION*

On March 26, 2002, defendant Frank Iacaboni pled guilty to two counts of gambling-related conspiracy, one count of managing an illegal gambling business, and one count of money laundering conspiracy. In a separate information he also pled guilty to substantive money laundering. In the plea agreement, defendant and the Government agreed to a bench trial on whether defendant's house, located at 640 Union Street in Leominster, Massachusetts, and various funds were subject to forfeiture as "involved in" the money laundering conspiracy. On April 17, 2002, the court began a three-day bench trial and heard testimony from six witnesses. As the following findings of fact and conclusions of law show, $384,245.00,

but not 640 Union St., will be forfeited pursuant to 18 U.S.C. § 982(a)(1).

II. *FINDINGS OF FACT*

1. In Count I of the indictment, defendant was charged with entering into a conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. § 321 from approximately 1995 until March, 1998. In Count II, defendant was charged with conducting an illegal gambling business in violation of 18 U.S.C. § 1955. In Count III, defendant was charged with entering into a conspiracy to conduct an illegal gambling business involving interstate travel in violation of 18 U.S.C. § 371. In Count IV, defendant was charged with entering into a conspiracy to launder money in violation of 18 U.S.C. § 1956(h) from approximately 1995 until March, 1998. In Count V, defendant was charged with money laundering on December 23, 1997, in violation of 18 U.S.C. § 1956(a)(1)(A)(i). Finally, the indictment contained a forfeiture allegation pursuant to 18 U.S.C. § 982(a)(1), seeking "any property, real or personal, involved in" the money laundering conspiracy.

2. Count I of the information charged defendant with money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i).

3. Pursuant to a plea agreement, defendant pled guilty to Counts I through IV of the indictment and Count I of the information. The Government agreed to dismiss Count V of the indictment.

4. A bench trial on the forfeiture allegation commenced on April 17, 2002.

5. The first witness was Robert Bolaski ("Bolaski"), who became a "phone man" for defendant in the early

1990's. With the exception of approximately three years from 1994 through 1996, Bolaski worked for defendant until March, 1998. Bolaski testified mainly about his involvement with defendant's bookmaking business from 1997 until March, 1998 and, in particular, the 1997 football season.

6. Bolaski explained that a "phone man" takes and registers bets from gamblers over the phone.

7. In a typical encounter, the gambler telephones the phone man, and the phone man informs the gambler of the "point spread" for a particular sporting event. The point spread is available from Las Vegas, or on a sports ticker. The gambler then informs the phone man of the desired betting amount, and the phone man registers the bet.

8. Defendant provided each phone man working for him with a list of gamblers who were permitted to place bets. Bolaski's list during most sporting seasons contained approximately 40-50 people.

9. Each phone man ran what was called an "office." Defendant provided his phone men with a fax machine, and reimbursed them for the cost of their phone bills in the amount of approximately $50.00 per month. There was no testimony on where or how Bolaski was reimbursed for his phone bill.

10. Defendant paid Bolaski a salary of $300.00 weekly. Bolaski worked for defendant for the entire 1997 football season. The regular football season, excluding the playoffs, is seventeen weeks long. Thus, Bolaski received at least $5,100.00 in salary from defendant in 1997 (17 weeks x $300.00).

11. Bolaski generally was paid on Mondays. Most of the time, defendant would pay Bolaski in cash at a

location across the street from defendant's legitimate business, a company known as "Mass Pallet."

12. Defendant employed Bolaski, and others, to "correct," or check, the figures of each individual office. Bolaski would make sure that defendant's other offices had correctly tabulated the results of a particular betting day and, in particular, had correctly calculated how much the organization owed, or was owed by, a particular bettor.

13. A document containing the betting results from each office would be faxed to defendant at defendant's house at least on a weekly basis.

14. Another of defendant's offices was run by Ryan Gallagher ("Gallagher"), who also testified. Like Bolaski, Gallagher was paid $300.00 per week for his services during the 1996 football season and was reimbursed for his phone line. In the 1997 football season Gallagher's weekly pay was raised to $350.00 per week. Thus, Gallagher received a total of $11,050.00 in salary for his work during the 1996 and 1997 football seasons (17 weeks x $300.00 + 17 weeks x $350.00).

15. Defendant compensated Gallagher and Bolaski with proceeds from his illegal gambling business.

16. Gallagher testified that he was paid at Gallagher's house, or "wherever [defendant] was."

17. Gallagher handled between 15 and 20 customers for defendant. Like Bolaski, Gallagher would take bets over the phone, and tabulate the results. Gallagher would then create a spreadsheet of sorts listing the amounts the office owed and was owed. Gallagher would not fax this document to defendant, however. Instead, Gallagher would bring the tabulation sheet

to defendant at defendant's business, defendant's home, or to some other location per instructions.

18. Gallagher and Bolaski both testified that the volume of betting in defendant's gambling business varied. Bolaski estimated that on a bad week, defendant's operation might owe up to fifteen to twenty thousand dollars to winners. On a good week, defendant's operation might be owed twenty to twenty-five thousand dollars from gamblers who had lost.

19. Winners were paid with the proceeds of the illegal gambling business.

20. Gallagher credibly testified that his office paid out approximately $10,000.00 per week to winning bettors, averaged over the entire seventeen-week football season. Thus, his office alone paid out approximately $170,000.00 per season.

21. The court also heard testimony from one of defendant's phone-in bettors, Larry Landman ("Landman"). Landman was a drywaller in Vermont, and placed bets with one of defendant's offices over the phone. He bet every weekend during the football season, and placed some bets on baseball and basketball as well. Often, Landman would drop off the money he owed defendant in cash at specified locations. When Landman won, he would pick up the money he was owed at the same locations.

22. On other occasions, Landman sent personal checks to defendant. These checks often bore the notation "personal loan." This subterfuge was Landman's idea, not defendant's. However, defendant took advantage of the Landman ploy, and did not attempt to correct the deception created by Landman's notation.

23. Defendant deposited Landman's checks into his personal bank account and co-mingled them with his legitimate funds in order to conceal the illegal nature of the Landman proceeds.

24. The Government presented evidence of twenty-one checks that Landman sent defendant in satisfaction of his gambling losses. Defendant deposited each of these checks into his personal bank account.[1] Landman checks deposited after May 24, 1996, included checks for $900.00 and $735.00 deposited on May 28, 1996; a check for $610.00 deposited on November 4, 1996; a check for $800.00 deposited on November 12, 1996; checks for $110.00 and $890.00 deposited on November 25, 1996; two checks for $975.00 deposited on December 3, 1996; and checks for $600.00 and $900.00 deposited on December 16, 1996, for a total of $7,495.00.

25. In addition to the phone betting operation, defendant also conducted an illegal "football tickets" business. A football ticket was a rectangular card that listed approximately 40 football games. A gambler could attempt to predict the winner of anywhere between four and ten games, or bet upon the score of the game, and put down between $1.00 and $10.00. A gambler's potential winnings increased depending upon the amount bet, and the number of games correctly picked.

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[1] There is a five-year statute of limitations for money laundering. The indictment was handed down May 24, 2001. Therefore, only those checks deposited after May 24, 1996 may be considered in the forfeiture analysis.

26. The court heard testimony from Robert Davies ("Davies"), who handed out and collected football tickets for defendant. Davies would distribute and collect the football tickets in, as he put it, "a couple factories, a couple restaurants." After all the tickets and money were collected, Davies turned in the tickets and money on Saturdays. Davies collected the money that was to be paid to winning bettors on Mondays.

27. Davies was paid a fifteen percent commission for his work with the football tickets and received no regular salary. The amount of money that Davies personally accepted with the football tickets varied from less than $100.00 to almost $1,000.00 per week.

28. Like the sheets from the bets that were phoned in, the football tickets needed to be "corrected," meaning examined to insure that winners and losers were denominated correctly. The court heard testimony from two individuals who corrected football tickets for defendant: Bolaski and Tina LaClair ("LaClair").

29. Bolaski and LaClair's task, when they corrected football tickets, was to first determine that the proper amount of cash accompanied each ticket. Second, they would calculate which tickets contained "winners" who had correctly predicted the outcome of four or more games. Finally, they would make up envelopes for the winners filled with the proper amount of cash. Bolaski received an additional $100.00 per week, over his normal $500.00 salary, when he corrected football tickets.

30. Bolaski corrected football tickets for defendant a few times at defendant's residence. While Bolaski was at defendant's house, he noticed a betting sheet he had faxed to defendant near defendant's fax machine in an upstairs room.

31. Bolaski would make up correction sheets as part of the process of correcting the football tickets. Government's Exhibit 3, seized during a trash search, indicates that one week defendant received $6,944.00 in proceeds from football ticket bets (after commissions were paid out), and during a second week defendant received $6,595.00 (after commissions were paid out). Bolaski testified, however, that $6,595.00 was "a real good week."

32. Bolaski testified that, often, he would meet Davies to pick up or drop off the football tickets. When Bolaski corrected tickets at defendant's house, however, Bolaski observed defendant fishing the football tickets and cash out of a garbage can in the garage attached to his house at 640 Union St. in Leominster.

33. In addition to his work with defendant, Bolaski ran a small football ticket business of his own. Bolaski used the same tickets as defendant, and had the same betting lines. Therefore, when defendant won with his football tickets, Bolaski won, and when defendant lost, Bolaski lost.

34. Bolaski testified that he lost money overall in 1997 on his football ticket business.

35. LaClair lived with defendant at 640 Union St. from approximately March, 1994 until November, 1999, when their romantic relationship ended. LaClair was responsible for the household bills and expenses and had access to defendant's checking account while they were living together.

36. Defendant gave LaClair checks and cash to deposit in the account. Approximately sixty percent of the deposits were in cash, although this percentage varied throughout the years they lived together. LaClair testified that she assumed that the cash deposits reflected defendant's legitimate winnings at the

racetrack. However, bank records reflect that $41,870.55 in cash was deposited in defendant's account between 1995 and March, 1997. Defendant's federal income tax forms for 1995, 1996, and 1997 report a total of only $17,789.00 in gambling winnings. Defendant was ostensibly unemployed during most of this time.

37. Defendant first asked LaClair to correct football tickets in 1996.

38. LaClair testified that, when she corrected tickets for defendant, the football tickets along with the cash wagered would be found in a trash can in the garage at 640 Union St.

39. At defendant's direction, LaClair would retrieve the tickets from the trash can in the garage, correct the tickets, and place the winners' envelopes back in the trash can when she was finished. LaClair performed this task approximately ten or twelve times between 1996 and 1998. The largest amount of cash LaClair remembered pulling from the can was "maybe $3,700.00 – rarely."

40. In December, 1997, defendant asked Bolaski to deliver an envelope to Al Bruno ("Bruno"), a man whom the Government alleges to be an organized crime figure. Defendant gave Bolaski the envelope at his house in Leominster.

41. When Bolaski arrived at the restaurant where he was to deliver the envelope, he was stopped and searched by law enforcement officers.

42. The officers seized the envelope. It contained $10,000.00 cash, and a letter addressed to "My Pal." The letter contained some personal greetings, and an apparent request. On page 1, defendant wrote, "Please, please grab that Anthony for me. He has

made me look like an *ass.*" (emphasis in original). On page 2, the request is apparently made again, "[o]nce again please get that fuckin' Anthony to pay me, (21,300), it has been a year, and things will loosen up for both of us. You have to take care of it. The Shoe can only do so much." (Exhibit 19). The court heard testimony that "the Shoe" was defendant's collection agent.

43. Defendant told Bolaski that the $10,000.00 cash in the envelope was intended to repay Bruno for a loan in connection with defendant's legitimate pallet business.

44. The Government also introduced testimony from defendant's accountant, Joseph Fraticelli ("Fraticelli"), who prepared defendant's tax returns from 1995 through 1997. Although Fraticelli required his clients to record all personal loans as "notes payable," Fraticelli could recall no note payable being given to him to record a personal loan to defendant from Adolfo Bruno.

45. In January, 1996, the FBI searched 640 Union St. pursuant to a warrant and seized gambling sheets of the sort that Bolaski and Gallagher would fax or deliver to defendant, and a sheet of paper listing Landman's address along with others. This evidence confirmed that defendant had been receiving faxes related to his illegal gambling business at 640 Union St.

46. Following conclusion of the bench trial, the court sentenced defendant on June 9, 2002, without making a final decision on the forfeiture issues. He received a sentence of ten months in custody, a fine of $30,000, and three years of supervised release. Final disposition of the case was held in abeyance pending rulings on the forfeiture issues.

47. Final argument on the forfeiture issues was heard on June 28, 2002. Supplemental papers were received on July 15, 2002.

III. *CONCLUSIONS OF LAW*

A. *Legal Standards*

1. *Notice and the Indictment*

One preliminary issue may be disposed of without difficulty. Defendant argues that 640 Union St. may not be subject to forfeiture because it was not specifically listed under the forfeiture allegation in the indictment. Defendant is mistaken. As the Government points out, Rule 32.2 governs criminal forfeiture. It requires only that the indictment "contain[] notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute." Fed.R.Crim.P. 32.2(a). The Advisory Committee Notes make clear that the rule "is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself." Fed.R.Crim.P. 32.2, Advisory Committee's Notes (2000). Here, the indictment specifically stated that "the defendant shall forfeit any property, real or personal" subject to forfeiture under 18 U.S.C. § 982(a)(1). (Docket 1). In addition, defendant had actual notice of the Government's intent to seek the forfeiture of 640 Union St. in the plea agreement and suffered no prejudice. Therefore, defendant's notice argument regarding the Union St. house is unavailing.

2. *Forfeiture*

It is important to note from the outset that only defendant's money laundering offense is directly relevant

to the forfeiture allegation. The Government for some reason did not bring a forfeiture claim pursuant to the gambling statute's forfeiture provision, 18 U.S.C. § 1955(d). Instead, the indictment's sole forfeiture allegation is under Title 18, § 982(a)(1), which provides,

> The court, in imposing sentence on a person convicted of an offense in violation of section 1956 . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

18 U.S.C. § 982(a)(1).

Given the language of the indictment, property that was used in defendant's illegal *gambling* business, but was *not* also "involved in" defendant's money laundering offense in violation of Section 1956, will not be subject to forfeiture. This distinction will be important in the discussion that follows.

3. *Money Laundering*

Defendant pled guilty to 18 U.S.C. § 1956(h), which provides that "any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." For purposes of forfeiture under 18 U.S.C. § 982(a)(1), defendant has conceded that any property "involved in" conduct actually constituting money laundering is properly considered property "involved in" the conspiracy to commit money laundering. The substantive money laundering offenses are defined in 18 U.S.C. § 1956(a)(1), which provides in relevant part:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> * * *
>
> (B) knowing that the transaction is designed in whole or in part
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;
>
> * * *
>
> shall be sentenced to a fine . . . or imprisonment . . . or both.
>
> 18 U.S.C. § 1956(a)(1).

Thus, for any given conduct to constitute the substantive offense of money laundering, two main conditions must be met. First, the conduct must constitute a financial transaction knowingly involving the proceeds of an unlawful activity. Second, the conduct must have served the purpose of "promoting" the specified unlawful activity (here, the illegal gambling operation), or "concealing" the proceeds of the illegal activity. Each of these requirements will be discussed in detail below.

a. *Financial Transaction Involving Proceeds*

In this case, only defendant's illegal gambling business is alleged to have generated "proceeds" that were

knowingly involved in a financial transaction. Section 1956 defines "financial transaction" to broadly include, "a transaction which in any way or degree affects interstate or foreign commerce . . . involving one or more monetary instruments" or "a transaction involving the use of a financial institution. . . . " 18 U.S.C. § 1956(c)(3). A "monetary instrument" is defined to include cash or a personal check, and "transaction" includes any transfer, delivery, or bank deposit.

The phrase "proceeds" of some form of unlawful activity is not defined in the statute, but has widely been interpreted to include any monetary instrument that is obtained as the result of an illegal activity, or the "total revenue" that is obtained from an illegal enterprise. *See United States v. Haun,* 90 F.3d 1096, 1101 (6th Cir.1996) (" 'Proceeds' is a commonly understood word in the English language. It includes 'what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue.' "); *United States v. Akintobi,* 159 F.3d 401, 403 (9th Cir.1998) (same).[2]

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[2] The Seventh Circuit has held in a recent case that "proceeds" must mean "net profits" rather than "total revenue." *United States v. Scialabba,* 282 F.3d 475 (7th Cir.2002). This court respectfully disagrees. Applying this construction to the statute, one could argue that so long as the illegal enterprise had no net profit, no money laundering prosecution would be possible. Because Congress could not have intended such a result, the court follows the majority of circuits in holding that "proceeds" should be interpreted as "total revenue" rather than "net profits." *See also United States v. Hurley,* 63 F.3d 1, 21 (1st Cir.1995) (rejecting interpretation of "proceeds" as "net profits" in the RICO forfeiture context).

Given this analysis, and the nature of an illegal gambling operation, defendant satisfied the *initial* requirement of the money laundering statute – *i.e.*, a monetary transaction knowingly involving the proceeds of an illegal activity – nearly every time illegal gambling money changed hands. For example, defendant engaged in a financial transaction involving the proceeds of his gambling business each time he (1) deposited Larry Landman's checks; (2) paid Bolaski or Gallagher's weekly salary; (3) reimbursed Bolaski and Gallagher for their phone lines or other supplies; (4) caused cash to be delivered to winning gamblers; (5) received cash from losing gamblers; or (6) gave Bolaski cash partly made up of the illegal proceeds to deliver to Bruno. If any of these financial transactions also "promoted" the gambling operation or "concealed" its proceeds as specified by subsections (A)(i) or (B)(i), that transaction constituted money laundering. Moreover, any property "involved in" the particular transaction would be subject to forfeiture.

b. *Purpose Requirement: Promotion or Concealment*

As noted, to satisfy the purpose requirement, defendant must have engaged in the financial transaction for the purpose of either (1) *promoting* the carrying on of his illegal gambling business; *or* (2) *concealing* or disguising the nature, location, source, ownership, of control of the proceeds of his illegal gambling business. Each of these possibilities will be discussed below.

i. *Promotion*

The "promotion" prong of the money laundering statute is less intuitive than the "concealment" prong, and has less definite boundaries. This ambiguity arises from the fact that nearly every financial transaction involving the proceeds of an illegal enterprise may potentially be described as in some way "promoting" the criminal activity.

Financial transactions at the heartland of the "promotion prong" are easy to identify. For example, using the proceeds of illegal video poker machines to purchase more illegal video poker machines obviously promotes the carrying on of an illegal gambling enterprise. *See United States v. Conley,* 37 F.3d 970, 973 (3d Cir.1994). Likewise, using drug proceeds to purchase more drugs obviously promotes the carrying on of the drug trade. It is also well established that paying the salaries of criminal employees promotes the carrying on of the criminal enterprise. *See id.* at 979 n. 12; *United States v. Leonard,* 61 F.3d 1181, 1186 (5th Cir.1995) (holding that "paying callers . . . with the victim's money for the purpose of bilking more people . . ." was money laundering).

Thus, it is clear that defendant engaged in "promotion" money laundering each time he used proceeds of his illegal gambling operation to (1) pay Bolaski and Gallagher's salaries, and (2) reimburse Bolaski and Gallagher for their phone lines or expenses. Bolaski and Gallagher were defendant's criminal employees. Paying their salaries, and reimbursing them for their phone lines and expenses, allowed defendant's illegal gambling business to carry on.

On the other hand, not every financial transaction involving the proceeds of an illegal activity constitutes

money laundering. *See Leonard,* 61 F.3d at 1185 n. 2 ("Obviously not every dollar spent in every transaction that can be traced to a specified criminal activity violates 18 U.S.C. § 1956(a)(1)(A)(i). To so interpret the statute would convert the money laundering statute into a money spending statute.") (internal quotation omitted). A good meal provides nourishment to the criminal body and gives him the energy to commit the next crime. Prescription eyewear makes the criminal better able to see his next victim. An expensive haircut may make the criminal more confident, and thus more daring in his next criminal venture. Yet purchasing these items with the proceeds of an illicit enterprise is clearly not money laundering, despite their tendency to "promote," in some indirect way, the next crime. *See United States v. Jackson,* 935 F.2d 832, 841 (7th Cir.1991) (holding that rental payments that merely maintained defendant's lifestyle did not satisfy promotion requirement of subsection (A)(i)).

While the purchase of a video poker machine with illegal proceeds obviously constitutes money laundering, and the purchase of a haircut with illegal proceeds obviously does not, conduct in the middle of these two poles presents a harder case. Two targets of the Government's forfeiture count fall into this grey area: (1) the funds expended by defendant to pay his winners, and (2) the Union St. real estate. The question for this stage of the analysis is whether defendant's treatment of these two items of property, the cash and the house, constituted the crime of money laundering. A second question – whether either was "involved" in the money laundering offense – will be addressed at a later stage of this discussion.

Turning first to the cash paid out to winners, the two sides of the argument can be expressed as follows. On the

one hand, paying winners is obviously part and parcel of the crime of operating an illegal gambling business. The First Circuit has made it clear that "Congress aimed § 1956 'at conduct that follows in time the underlying crime rather to afford an alternative means of punishing the prior specified unlawful activity.'" *United States v. LeBlanc,* 24 F.3d 340, 346 (1st Cir.1994), *quoting United States v. Johnson,* 971 F.2d 562, 569 (10th Cir.1992). Paying winners may be seen as a bedrock feature of the "specified unlawful activity" itself, not money laundering. *See United States v. Richard,* 234 F.3d 763, 769 (1st Cir.2000) ("money laundering criminalizes a transaction in proceeds, not the transaction that creates the proceeds"). Under the Government's logic, *any* illegal gambling operation would also be a money laundering operation. While it is true, as the Government points out, that the law in some circumstances permits the punishment of a single course of illegal conduct under different criminal statutes simultaneously, there is something troubling about the inevitable and almost exact overlap of the money laundering and gambling statutes in this case. As the Third Circuit has noted, " . . . Congress did not enact money laundering statutes simply to add to the penalties for various crimes in which defendants make money." *United States v. Conley,* 37 F.3d 970, 979 (3rd Cir.1994) (citation omitted).

On the other hand, it cannot be denied that the transactions in which defendant paid cash to his winners fall within the explicit words of the money laundering statute. First, it is clear on the record, and the court has found, that the cash involved in the transactions (*i.e.,* the money used to pay the winners) "represent[ed] the proceeds of some form of unlawful activity" and that defendant knew it. No

doubt exists, in other words, that defendant knowingly used the cash flow from the illegal gambling operation to make these payments.

Second, it cannot seriously be disputed that these "financial transactions" (*i.e.,* the payments to winners) were intended "to promote the carrying on of the specified unlawful activity." Nothing makes an illegal gambling operation flourish more than the prompt payment of winners. Under this logic, payments by a gambling operation to winners are a form of money laundering, pure and simple. The Seventh Circuit has reached just this conclusion in a case on all fours with this one, *United States. v. Febus,* 218 F.3d 784, 790 (7th Cir.2000) (" . . . [P]ayments to winning players promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage.").

Of the two arguments, the latter is the stronger. As noted, the transactions by which defendant paid his winners fall neatly within the terms of the money laundering statute. Nor does it strike the court as fundamentally unfair to view as money laundering the conduct of defendant that took the proceeds of his illegal business and used them to increase the popularity and viability of his criminal operation by paying his winners. In a gambling prosecution, payments to winners constitute money laundering.

The Union St. house presents a different picture, at least at this stage of the analysis. No evidence suggests that this real estate constituted the proceeds of an illegal activity, or that it was used in any "transaction," as that term is defined in the statute. The fact that substantial evidence suggests that the house was used to promote the

illegal gambling operation is not sufficient to demonstrate that defendant's use of the house in any way constituted the crime of money laundering. Whether it was "involved in" the money laundering, under the forfeiture statute, will be addressed below.

ii. *Concealment*

The proper scope of money laundering by concealment is a much simpler matter. Indeed, the language of the statute speaks for itself. As noted, a person commits "concealment" money laundering when he conducts a financial transaction involving the proceeds of an unlawful activity "knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). Therefore, a person commits this version of money laundering each time he engages in a financial transaction with the design of hiding the location or source of the ill-gotten gains. Indeed, a person may commit money laundering merely by depositing the proceeds of an unlawful activity into a bank account in his own name, so long as he does so in order to "to conceal or disguise" the illegal nature or source of those funds. *United States v. McGauley,* 279 F.3d 62, 71 (1st Cir.2002).

B. *Forfeiture*

The above analysis has addressed what conduct constituted money laundering for purposes of the forfeiture statute. The next question is: What property is subject to forfeiture? As noted, 18 U.S.C. § 982(a)(1) provides that,

> The court, in imposing sentence on a person convicted of an offense in violation of section 1956 . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

18 U.S.C. § 982(a)(1).

At this stage of the analysis it is crucial to understand that this statute renders forfeitable only property "involved in" *money laundering*. The phrase "such offense" clearly refers to money laundering, *not* the "specified unlawful activity" that constitutes the predicate offense under § 1956. The Government had the option of seeking forfeiture directly under the forfeiture statute associated with the gambling offense, but chose not to do so. Under this indictment, only property "involved in" money laundering is subject to forfeiture.

The Government contends that the following items of real and personal property are subject to forfeiture: (1) 640 Union Street in Leominster, Massachusetts; (2) the $10,000 cash in the envelope seized from Bolaski; (3) the salaries paid to Bolaski and Gallagher over the 1996 and 1997 football seasons; (4) the Landman checks deposited in defendant's personal bank account; and (5) the cash paid out in winnings to bettors over the 1996 and 1997 football seasons. Each of these items is discussed in turn.

1. *640 Union Street*

Certainly, substantial evidence exists that the Union St. property was used to promote defendant's gambling business. Envelopes with money and documents were dropped off and picked up in the garage, faxes and phone

calls related to the enterprise came to and went from the residence, football tickets were "corrected" on the premises, and meetings were held in the house. Given these facts, the Government would have a strong case for forfeiture of the house under the statute permitting forfeiture of "property . . . used in violation" of the gambling statute, 18 U.S.C. § 1955(d), if this provision had been cited in the formal charge. This statute, however, was not mentioned in the indictment and has not been offered as a justification for forfeiture here.

It is also clear that the evidence of record related to the Union St. property would satisfy one tine of the money laundering statute; it clearly *was* used to "with the intent to promote the carrying on of the specified unlawful activity," *i.e.*, the illegal gambling business. It is equally clear, however, that the conduct centering on the house itself could not constitute the crime of money laundering, since the house was neither the "proceeds" of any illegal activity, nor a part of any "transaction" as the money laundering statute defines that term. "Use" of a piece of property to promote a gambling activity may make that property subject to forfeiture under § 1955(d), but such "use" does not make the user guilty of money laundering under § 1956.

In seeking forfeiture of the Union St. property, the Government appears to confuse the phrase "specified unlawful activity" in 18 U.S.C. § 1956(a)(1) with the words "such offense" in 18 U.S.C. § 982(a)(1). On the facts of this case, the first phrase refers to the illegal gambling operation, while the second refers to money laundering. To justify forfeiture under § 982, it is not enough merely to show that the Union St. property was involved in the

gambling operation; the Government must demonstrate that the house was involved in money laundering.[3]

The evidence demonstrating such involvement in this case falls far short. The heart of an act of money laundering is a transaction involving illegal proceeds. Most of what the Government cites as support for its forfeiture claim against the house – the faxes and phone calls, the "correcting" of football tickets and the like – was not by any construction a "transaction" at all. This sort of criminal activity constituted merely conduct supporting the gambling operation and does not reflect involvement of the real property in money laundering.

The only activity occurring at the house that could conceivably be described as a "transaction" (*i.e.*, a "purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition") occurred when defendant's employees periodically dropped off or picked up cash from the garbage can in defendant's garage. Significantly, the collection of money from bettors, and the payments to bettors, did not occur in the garage or any where else at the Union St. property; these "transactions" with the enterprise's customers occurred away from the premises. The "transfers" to and from defendant's garbage can constituted only the hand-off of cash from one co-conspirator to another, to be counted and, in some cases, returned for re-delivery to the

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[3] This same confusion appears to have infected some of the cases cited by the Government, which the court finds unpersuasive, where courts seem to have found property promoting the underlying "specified unlawful activity" subject to forfeiture under the money laundering statute, even where it does not appear to have been "involved" in the money laundering.

customer at another site away from the house. The course of behavior may be analogized to the division of cash proceeds derived from an illegal drug sale between the street dealer and his supplier.

The court is not persuaded, as a factual matter, that these "garbage can" transfers created a "substantial connection" between the Union St. real estate and any *money laundering* activity on the part of defendant. Put differently, the property here was neither the "situs" or the "nexus" of the money laundering crimes. *See United States v. 28 Emery St.*, 914 F.2d 1, 4 (1st Cir.1990). *See also United States v. White,* 116 F.3d 948, 952 (1st Cir.1997); *United States v. 221 Dana Ave.*, 261 F.3d 65, 69 n. 2 (1st Cir.2001); *United States v. 40 Clark Rd.*, 52 F.Supp.2d 254, 261 (D.Mass.1999).[4] The fact that the coconspirators sometimes parceled out the cash, and did their accounting, at the house did not tie the property closely enough to the money laundering activities to make the premises subject to forfeiture. Its use, on the facts of this case, was no more than "incidental or fortuitous." *Parcel of Land,* at 4, *citing United States v. 916 Douglas Ave.*, 903 F.2d 490, 494 (7th Cir.1990) (footnote omitted). While the forfeiture statute covering money laundering is broad, it cannot be stretched to require forfeiture of any site where felons pass cash back and forth, without losing its boundaries almost

[4] Although these cases were decided in the civil forfeiture context, or in the context of forfeiture pursuant to the criminal drug statute, the governing principles are applicable to § 982 forfeiture proceedings as well. *See United States v. Saccoccia,* 58 F.3d 754, 783 n. 25 (1st Cir.1995) (discussing "genealogy of modern criminal forfeiture" and noting that analysis is "equally applicable to criminal forfeiture under the money laundering laws.").

entirely. Since the 640 Union St. property was "involved in" defendant's money laundering, at most, as a site where defendant and his henchmen dropped off and picked up cash, it is not subject to forfeiture under 18 U.S.C. § 982(a)(1).

2. *$10,000 cash*

The entire $10,000 cash Bolaski attempted to deliver to Bruno will be forfeited as property "involved in" the commission of money laundering through concealment. 18 U.S.C. § 1956(a)(1)(B)(i). As noted, defendant told Bolaski that the $10,000 was intended to repay a loan in connection with defendant's legitimate business. However, he agreed at trial that at least some of the cash in the envelope constituted proceeds from his illegal gambling business. Defendant engaged in a financial transaction when he transferred the cash to Bolaski for purposes of delivery to Bruno. Styling the entire sum as proceeds from defendant's legitimate business concealed the "source" of the cash, and calling the delivery a loan repayment disguised the "nature" of the transaction. Thus, defendant committed money laundering in violation of Section 1956(a)(1)(B)(i) when he attempted to deliver the cash to Bruno. The entire $10,000 was "involved in" this deception, and is therefore forfeit. *See United States v. McGauley,* 279 F.3d 62, 76 (1st Cir.2002) (comingling legitimate funds with illegitimate funds for the purpose of concealing the illegitimate funds renders the whole sum forfeit).

3. *Landman's checks*

The funds from the Landman checks are also subject to forfeiture. The Government correctly points out that there is little question that defendant engaged in a financial transaction involving the proceeds of an unlawful activity when he deposited Landman's checks into his personal bank account. Moreover, the court finds that defendant's purpose in depositing these funds in his general bank account was to conceal their illegal nature. Commingling tainted funds with legitimate funds "for the purpose of concealing the nature or source of the tainted funds" constitutes concealment money laundering. *McGauley,* 279 F.3d at 76. While it is true that simply "depositing the proceeds of unlawful activity in a bank account in his own name," is a "non-money laundering act," *Conley,* 37 F.3d at 979, here the aim was deception. Defendant took advantage of Landman's "personal loan" ruse and mixed the funds with legitimate monies to camouflage their nature. These funds will be forfeited.

4. *Salaries*

As discussed in detail above, the salaries and phone reimbursements defendant paid to Gallagher and Bolaski will be forfeited as funds directly "involved in" money laundering. Gallagher earned at least $11,050.00 in salary during the 1996 and 1997 football seasons, and Bolaski earned at least $5,100.00 in salary during the 1997 football season. Each was reimbursed $50.00 per month for their phone lines. Thus, defendant paid at least $200.00 for Gallagher's phone line over the 1996 football season, and $400.00 for Gallagher and Bolaski's phone lines over the 1997 football season, for a total of $600.00. Insufficient evidence was presented of how often Bolaski was given his

$100.00 salary for correcting football tickets. No other evidence was introduced of additional reimbursements, salaries, or other operating expenses for defendant's illegal gambling business. Therefore, a total of $16,750.00 in salaries and operating expenses will be forfeited as directly "involved in" money laundering.

5. *Winner's Payments*

The funds defendant paid out in winnings over the 1996 and 1997 football seasons also will be forfeited. As discussed in detail above, the transactions by which defendant paid his winners directly violated the money laundering statute. The funds paid to winners were thus "involved in" money laundering, and therefore are subject to forfeiture. With regard to the phone-in bettors, the court agrees that the Government's arithmetic is reasonable, supported by the evidence, and more than fair to defendant. With regard to pay-outs to winners on the football tickets, however, the court finds that the evidence is too speculative to support the figure proposed by the government.

Regarding the phone-in bettors, defendant's organization paid out at least $340,000.00 to winners over the 1996 and 1997 football seasons through Gallagher's office alone. As noted in the facts section, Gallagher credibly testified that his office paid out an average of $10,000.00 per week over the seventeen week football seasons in 1996 and 1997. The Government suggests that $340,000.00, which does not include payments from other offices or related to other sports, is an extremely conservative estimate of the sum paid to phone-in winners by defendant's organization.

The court concurs, and $340,000.00 will therefore be subject to forfeiture.

Regarding the football ticket business, the court finds that the Government's figure of $51,000.00 is not supported by the evidence. This conclusion is based in large part on the fact that the Government erroneously sought the forfeiture of $51,000.00 in football ticket "proceeds." This formulation of its forfeiture theory was in error because, as noted above, mere "proceeds" collected from defendant's illegal gambling business were not necessarily "involved in" *money laundering.*

The court might speculate that defendant's payments to football ticket winners equaled the amount of defendant's proceeds. The testimony established that the 1997 season was not a good football ticket season. Indeed, Bolaski used the same tickets as defendant, and testified that he lost money overall in 1997. Thus, the court could guess that defendant paid out at least as much as he took in from football tickets in 1997. As the Government notes, a conservative estimate of the *proceeds* of defendant's football ticket business was $3,000.00 per week, or $51,000.00 for the seventeen week season. That sum might also represent the amount defendant paid out, if defendant, like Bolaski, did in fact lose money on the football ticket business in 1997.

This figure, however, is much too speculative on the evidence presented. The court will therefore order that the modest sum of $10,000.00 be forfeited as funds that were "involved in" payments to football ticket winners. Logic and statistics dictate that defendant had some winners, and $10,000.00 seems a more than reasonable estimate for

forfeiture. Thus, a total of $350,000.00 in payments to phone-in and football ticket winners will be forfeited.

Adding this $350,000.00 to the $10,000.00 Bolaski attempted to deliver to Bruno, the $7,495.00 in deposited Landman proceeds, and the $16,750.00 in salaries and phone-related funds that were determined to be subject to forfeiture above, a total of $384,245.00 will be forfeited pursuant to 18 U.S.C. § 982(a)(1) as property "involved in" the violation of 18 U.S.C. § 1956(a)(1).

IV. *CONCLUSION*

For the reasons set forth above, $384,245.00 is hereby ordered to be forfeited pursuant to 18 U.S.C. § 982(a)(1).

A separate Order will issue.

ORDER

For the reasons stated in the accompanying Memorandum, the sum of $384,245.00 is hereby ordered to be forfeited pursuant to 18 U.S.C. § 982(a)(1).

It is So Ordered.

United States Court of Appeals
For the First Circuit

No. 02-2141

UNITED STATES

Appellee

v.

FRANK IACABONI, a/k/a Mr. Leo

Defendant-Appellant

Before

Boudin, *Chief Judge,*
Torruella and Selya, *Circuit Judges,*
Lynch, Lipez and Howard *Circuit Judges.*

ORDER OF COURT
Entered: May 6, 2004

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:

RICHARD CUSHING DONOVAN, Clerk

By: Mark R. Syska
Chief Deputy Clerk

[cc: Thomas J. Butters, Esq., Andrew G. Levchuk, Esq., Dina M. Chaitowitz, AUSA]

18 U.S.C.A. § 982. Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate –

> **(A)** section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or
>
> **(B)** section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing a sentence on a person convicted of an offense under –

> **(A)** section 666(a)(1) (relating to Federal program fraud);
>
> **(B)** section 1001 (relating to fraud and false statements);
>
> **(C)** section 1031 (relating to major fraud against the United States);
>
> **(D)** section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of insured financial institution);
>
> **(E)** section 1341 (relating to mail fraud); or

(F) section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate –

(A) section 511 (altering or removing motor vehicle identification numbers);

(B) section 553 (importing or exporting stolen motor vehicles);

(C) section 2119 (armed robbery of automobiles);

(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

(6)(A) The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act or section 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title, or a violation of, or conspiracy to violate, section 1028 of this title if committed in connection with passport or visa issuance or use, shall order that the person forfeit to the United States, regardless of any provision of State law –

(i) any conveyance, including any vessel, vehicle, or aircraft used in the commission of the offense of which the person is convicted; and

(ii) any property real or personal –

(I) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the person is convicted; or

(II) that is used to facilitate, or is intended to be used to facilitate, the commission of the offense of which the person is convicted.

(B) The court, in imposing sentence on a person described in subparagraph (A), shall order that the person forfeit to the United States all property described in that subparagraph.

(7) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

(8) The court, in sentencing a defendant convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or of a conspiracy to commit such an offense, if the offense involves telemarketing (as that term is defined in section 2325), shall order that the defendant forfeit to the United States any real or personal property –

> **(A)** used or intended to be used to commit, to facilitate, or to promote the commission of such offense; and
>
> **(B)** constituting, derived from, or traceable to the gross proceeds that the defendant obtained directly or indirectly as a result of the offense.

(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the

forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

---

18 U.S.C.A. § 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section –

(1) "illegal gambling business" means a gambling business which –

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection

(c) of section 501 of the Internal Revenue Code of 1986, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

---

18 U.S.C.A. § 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

> **(A)(i)** with the intent to promote the carrying on of specified unlawful activity; or
>
> **(ii)** with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> **(B)** knowing that the transaction is designed in whole or in part –
>
> > **(i)** to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> >
> > **(ii)** to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –

> **(A)** with the intent to promote the carrying on of specified unlawful activity; or
>
> **(B)** knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –
>
> > **(i)** to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> >
> > **(ii)** to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent –

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) **Penalties.** –

(1) **In general.** – Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of –

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) **Jurisdiction over foreign persons.** – For purposes of adjudicating an action filed or enforcing a

penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and –

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets. – A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver. –

(A) In general. – A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a

criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority. – A Federal Receiver described in subparagraph (A) –

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant –

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section –

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew

the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes –

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1[1] of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving –

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as

[1] So in original. Probably should read "section 1(b)".

defined in paragraph 7 of section 1(b) of the International Banking Act of 1978));[2]

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving –

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

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[2] So in original. The second closing parenthesis probably should not appear.

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a

foreign country), section 1005 (relating to fraudulent bank entries), 1006[3] (relating to fraudulent Federal credit institution entries), 1007[3] (relating to fraudulent Federal Deposit Insurance transactions), 1014[3] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032[3] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A or 2339B (relating to providing material support to terrorists) of

[3] So in original. Probably should be preceded by "section".

this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 [7 U.S.C.A. § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, or any felony violation of the Foreign Corrupt Practices Act;

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if –

> **(1)** the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
>
> **(2)** the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions. – If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of

this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue. – **(1)** Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in –

> **(A)** any district in which the financial or monetary transaction is conducted; or
>
> **(B)** any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

(2)

OCT 7 - 2004

OFFICE OF THE CLERK

No. 04-183

In the Supreme Court of the United States

FRANK IACABONI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
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QUESTIONS PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1) (2000 & Supp. I 2001), makes it a crime, *inter alia*, to engage in a financial transaction using the "proceeds" of certain specified unlawful activities with "the intent to promote the carrying on" of those activities. The questions presented are:

1. Whether "proceeds" under the money laundering statute, 18 U.S.C. 1956(a)(1), means the gross receipts from the unlawful activities or only the profits, *i.e.*, gross receipts less expenses.

2. Whether petitioner, who pleaded guilty to a money laundering offense, intended to promote the carrying on of a gambling business by making payments to winning bettors.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

United States v. *Broce*, 488 U.S. 563 (1989)	6-7, 12
United States v. *Conley*, 37 F.3d 970 (3d Cir. 1994)	11
United States v. *Febus*, 218 F.3d 784 (7th Cir.), cert. denied, 531 U.S. 1021 (2000)	15
United States v. *Genova*, 333 F.3d 750 (7th Cir. 2003)	11
United States v. *Grasso*, No. 03-1441, 2004 WL 1874620 (3d Cir. Aug. 23, 2004), 2004)	8-9, 10, 11, 14
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United States v. *Hurley*, 63 F.3d 1 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996)	7, 8
United States v. *LeBlanc*, 24 F.3d 340 (1st Cir.), cert. denied, 513 U.S. 896 (1994)	6
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United States v. *Prince*, 214 F.3d 740 (6th Cir.), cert. denied, 531 U.S. 974 (2000)	10
United States v. *Real Prop. Known as 1700 Duncanville Road*, 90 F. Supp. 2d 737 (N.D. Tex. 2000), aff'd, 250 F.3d 738 (5th Cir. 2001)	12-13

Cases—Continued: Page

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Verizon Communications, Inc. v. *FCC*, 535 U.S. 467 (2002) 14

Statutes:

18 U.S.C. 371 2
18 U.S.C. 982(a) (2000 & Supp. I 2001) 7
18 U.S.C. 982(a)(1) (Supp. I 2001) 2, 3, 12
18 U.S.C. 1955 ..... 2, 3
18 U.S.C. 1956(a)(1) 3, 10, 12
18 U.S.C. 1956(a)(1)(A)(i) 2, 3, 4, 9, 10, 14
18 U.S.C. 1956(a)(1)(B)(i) 2, 3, 5, 7
18 U.S.C. 1956(c)(7)(A) 3
18 U.S.C. 1961(1) (2000 & Supp. I 2001) 3
18 U.S.C. 1963(a)(3) 10

Miscellaneous:

Websters Third New International Dictionary (1971) 9-10

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 363 F.3d 1. The opinion of the district court (Pet. App. 14-42) is reported at 221 F. Supp. 2d 104.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2004. A petition for rehearing was denied on May 6, 2004 (Pet. App. 43-44). The petition for a writ of certiorari was filed on August 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiring to conduct an illegal

gambling business, in violation of 18 U.S.C. 371; operating an illegal gambling business, in violation of 18 U.S.C. 1955; conspiring to conduct an illegal gambling business involving interstate travel, in violation of 18 U.S.C. 371; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); and committing money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i).

The district court subsequently held a bench trial on allegations in the indictment seeking the forfeiture, under 18 U.S.C. 982(a)(1) (Supp. I 2001), of any property "involved in" the money laundering offense. The court sentenced petitioner to ten months of imprisonment, to be followed by a three-year term of supervised release, and fined him $30,000. In addition, the court ordered petitioner to forfeit $384,245. Pet. App. 42. The court of appeals reversed with respect to one item covered by the forfeiture order and affirmed the order in all other respects. *Id.* at 1-13.

1. From 1995 through March 1998, petitioner ran an illegal sports gambling operation in and around Leominister, Massachusetts. His operation included several "offices" headed by individuals to take bets over the telephone. Petitioner also ran a "football" ticket business, in which bettors paid between $1 and $10 for "tickets" allowing them to bet on upcoming games. Pet. App. 1-2. Petitioner's operation owed approximately $15,000 to $20,000 to winning bettors during a bad week, and collected approximately $20,000 to $25,000 from losing bettors during a good week. *Id.* at 3.

2. The federal money laundering statute at issue here makes it a crime when anyone,

> knowing that the property involved in a financial transaction represents the proceeds of some form of

> unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or * * *
>
> (B) knowing that the transaction is designed in whole or in part —
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(1). In essence, subsection (A)(i) prohibits transactions involving the proceeds of specified crimes to promote any of those crimes, and subsection (B)(i) prohibits transactions involving the proceeds to conceal the fact that they are the product of crime.

The money laundering statute defines "specified unlawful activity" to include, among a variety of other offenses, the racketeering acts enumerated in 18 U.S.C. 1961(1) (2000 & Supp. I 2001). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include the running of an illegal gambling business, in violation of 18 U.S.C. 1955. See 18 U.S.C. 1961(1) (2000 & Supp. I 2001).

Under 18 U.S.C. 982(a)(1) (Supp. I 2001), "[t]he court, in imposing sentence on a person convicted of an offense in violation of section 1956 * * * of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." Thus, under Section 982(a)(1), a person must forfeit any property "involved in" a money laundering offense.

3. a. Among other charges, petitioner pleaded guilty to Count 4 of the indictment, which charged him with entering a conspiracy to launder money, from approximately 1995 until March 1998, in violation of the promotion subsection of the money laundering statute, Section 1956(a)(1)(A)(i). C.A. App. 21. Count 4 alleged that petitioner, "knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, knowingly and intentionally * * * conspired * * * to conduct financial transactions" with gambling proceeds "with the intent to promote the carrying on of such specified unlawful activity." *Ibid.* Count 4 identified the financial transactions promoting the illegal gambling business as "a) pa[ying] cash representing winning wagers to their gambling customers; b) pa[ying] their agents for the amount of gambling action taken by those agents; c) pa[ying] salaries to other individuals; d) purchas[ing] equipment for the gambling business, including telephones and fax machines; and e) pa[ying] rent or ma[king] other cash payments to secure the use of locations in which to take phone calls from bettors." *Id.* at 22-23. In pleading guilty, petitioner "expressly and unequivocally admit[ted] that he in fact knowingly and intentionally committed the crimes charged in Counts One through Four of the Indictment, and [was] in fact guilty of those offenses." 3/26/02 Plea Agreement 1, 10; see 3/26/02 Tr. 16-17, 28-29 (plea colloquy). In the plea agreement, petitioner and the United States agreed to a bench trial on whether certain property and funds were subject to forfeiture as "involved in" the money laundering conspiracy. Pet. App. 14.

b. At the bench trial, the district court heard testimony from, among others, two of petitioner's "phone men," who ran gambling "office[s]" for petitioner and

registered bets from gamblers over the phone. Pet. App. 16-17. The district court found that petitioner "provided each phone man working for him with a list of gamblers who were permitted to place bets." *Id.* at 16. Petitioner also paid the phone men "salaries," reimbursed them for their phone bills, and provided them with a fax machine. *Ibid.* The district court further found that "[w]inners were paid with the proceeds of the illegal gambling business." *Id.* at 18. The district court concluded that these payments "were intended 'to promote the carrying on of the specified unlawful activity.' Nothing makes an illegal gambling operation flourish more than the prompt payment of winners." *Id.* at 32.

The district court ordered petitioner to forfeit a total of $384,245. Pet. App. 42. The amounts forfeited as "involved in" the money laundering conspiracy charged in Count 4 included $340,000 paid to winning phone-in bettors over the 1996 and 1997 football seasons (*id.* at 40-41), $10,000 paid to winning football ticket bettors (*id.* at 41-42), $16,750 in salaries and operating expenses (*id.* at 39-40), and $7495 in payments from a losing bettor that petitioner had deposited into his personal bank account (*id.* at 39).[1]

4. a. On appeal, petitioner did not challenge his conviction on Count 4 for conspiracy to commit promotional money laundering. Instead, he challenged only the district court's forfeiture order arguing, among other things, that the district court erred in ordering the

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[1] The forfeiture amount also included $10,000 cash forfeited as a result of petitioner's pleading guilty to an information charging concealment money laundering, pursuant to 18 U.S.C. 1956(a)(1)(B)(i), with respect to one particular transaction. Pet. App. 38.

forfeiture of amounts he paid to winning bettors. Pet. C.A. Br. 10-23. As petitioner described it, "[t]he gist of this argument [was] that paying winning bettors is an essential part of the operation of a gambling business and, without more, does not constitute money laundering." *Id.* at 10-11.

In making that argument, petitioner discussed *United States* v. *Scialabba*, 282 F.3d 475, cert. denied, 537 U.S. 1071 (2002), in which the Seventh Circuit defined "proceeds" within the meaning of the money laundering statute as "net income." See Pet. C.A. Br. 20-22. Petitioner did not, however, press the First Circuit to adopt *Scialabba*'s holding that "proceeds" must be "net income." To the contrary, he assured the court of appeals that the district court's concern "that money laundering could not occur absent a net profit under *Scialabba*, was misplaced in light of [the First Circuit's] holding in *LeBlanc*." *Id.* at 22 (citing *United States* v. *LeBlanc*, 24 F.3d 340, cert. denied, 513 U.S. 896 (1994)). And, in accord with his argument that promotional money laundering required some "extra step" beyond the ordinary operation of the illegal gambling business, and in contrast to the holding of the Seventh Circuit, petitioner defined "proceeds" as funds "derived from the already completed offense or a completed phase of an offense." *Id.* at 18 & n.6.

In its response, the government argued that petitioner could not challenge the forfeiture order based upon the meaning of the money laundering statute. The government contended that, in pleading guilty, petitioner had admitted that the financial transactions in the indictment, including his payments to winning bettors, constituted the use of illegal proceeds with the specific intent to promote his illegal gambling operation. Gov't C.A. Br. 17-19 (citing *United States* v.

Broce, 488 U.S. 563, 570 (1989)). The government also argued that there was ample evidence that the payments to winning bettors were "involved in" money laundering such that they were forfeitable under 18 U.S.C. 982(a) (2000 & Supp. I 2001). *Id.* at 28.

In reply, petitioner contended that his guilty plea did not waive his challenge, claiming that his argument was grounded on the proposition that, if Count 4 had charged only payments to winning bettors, Count 4 would not have alleged an offense and the district court would have been without jurisdiction to accept the plea, and thus without jurisdiction to enter the order forfeiting those payments. Pet. C.A. Reply Br. 2-3.

b. Without addressing the waiver issue, the court of appeals rejected petitioner's arguments, with one exception. Pet. App. 1-13.[2] The court of appeals understood petitioner to be relying upon *Scialabba* to "argu[e] that 'proceeds' refers to net income of the illegal gambling operation, not payouts." *Id.* at 6. The court of appeals acknowledged that the Seventh Circuit's *Scialabba* decision defined "proceeds" within the meaning of the money laundering statute as "profits." Pet. App. 7. The court noted, however, that it previously had rejected that interpretation of the term "proceeds" in the RICO context. *Ibid.* (citing *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996)). The court concluded that

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[2] The court of appeals reversed the district court only insofar as that court determined that the $7495 in checks that petitioner had deposited in his personal checking account were forfeitable. The court of appeals concluded that, in forfeiting the amount of the checks, the district court improperly relied upon a theory of concealment money laundering, 18 U.S.C. 1956(a)(1)(B)(i), with which petitioner had not been charged with respect to those checks. Pet. App. 12-13.

petitioner had provided "no rationale" for abandoning that approach here. *Ibid.* Except for one aspect of the forfeiture not at issue here, the court then rejected petitioner's remaining arguments, including his argument that, because payments to winning bettors were an integral part of the illegal gambling operation, they could not be considered "promotion" of the operation. *Id.* at 7-10.

ARGUMENT

Petitioner seeks review on the question "whether payments to winning gamblers during the operation of an illegal gambling business constitutes the separate offense of promotional money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i)." Pet. i. He contends that the decision below conflicts with the Seventh Circuit's holding in *United States* v. *Scialabba*, 282 F.3d 475, cert. denied, 537 U.S. 1071 (2002), that "proceeds" in the money laundering statute means "net profits," rather than gross receipts, Pet. 8-10, and that he lacked the intent to engage in promotional money laundering by making payments to winning bettors. *Id.* at 16-17. The court of appeals correctly rejected the notion that "proceeds" means "net profits," and although there is a conflict in the circuits on that question, further review of that issue is not warranted on the facts of this case. And petitioner's fact-specific challenge to his intent to promote his gambling business, which he admitted in pleading guilty, does not present an issue warranting further review.

1. The circuits are divided on the meaning of the term "proceeds" in the federal money laundering statute. The First Circuit's ruling in this case that the word "proceeds" means gross receipts and not profits is consistent with the Third Circuit's decision in *United*

States v. *Grasso*, No. 03-1441, 2004 WL 1874620 (Aug. 23, 2004). In *Grasso*, the defendant was convicted, under 18 U.S.C. 1956(a)(1)(A)(i), of laundering the proceeds of a fraudulent work-at-home scheme by reinvesting the proceeds of his criminal activity to purchase advertising, telephone services, printing, envelopes, and other materials in furtherance of the scheme. On appeal, the defendant contended that the evidence failed to support his money laundering conviction because it did not show that the allegedly laundered funds represented "net profits" of the fraudulent scheme rather than "gross receipts or revenue." 2004 WL 1874620, at *3. The court of appeals rejected that claim, holding that "'proceeds,' as that term is used in § 1956, means simply gross receipts from illegal activity. An individual may engage in money laundering regardless whether his or her criminal endeavor ultimately turns a profit." *Id.* at *7.[3]

The definition of "proceeds" adopted by the court below is also consistent with the definition used by the Sixth Circuit. In *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), the Sixth Circuit rejected a due process challenge to Section 1956(a)(1)(A)(i) that was based on the contention that the word "proceeds" is unconstitutionally vague. The court of appeals held that "proceeds" is not unconstitutionally vague because it "is a commonly understood word in the English language" that includes "what is produced by or derived from something (as a sale, investment, levy, business) by way of *total revenue*." *Ibid.* (emphasis added) (quoting *Webster's Third New*

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[3] Although the Third Circuit reviewed the defendant's claim for plain error, it noted that it "would affirm even under *de novo* review." 2004 WL 1874620, at *4.

International Dictionary 1807 (1971)). Accord *United States* v. *Prince*, 214 F.3d 740, 747 (6th Cir.), cert. denied, 531 U.S. 974 (2000); see *United States* v. *Monaco*, 194 F.3d 381, 385-386 (2d Cir. 1999) (rejecting vagueness challenge to the word "proceeds" in Section 1956(a)(1) and quoting *Haun*, 90 F.3d at 1101, for the proposition that "'[p]roceeds' is a commonly understood word in the English language"), cert. denied, 529 U.S. 1028 (2000).

As both the court below (Pet. App. 6-7) and the *Grasso* court (2004 WL 1874620, at *5) explicitly recognized, however, the Seventh Circuit has taken the contrary view, defining the word "proceeds" in the money laundering statute as "profits." In *Scialabba*, the defendants provided video poker and slot machines to bars, restaurants, and other retail outlets. Each week they opened the machines and collected any deposited money, which they then used to reimburse the outlet owners for payments to winning customers, to pay the outlet owners for their role, to lease the gambling machines, and to obtain the amusement licenses necessary to operate the machines. See *Scialabba*, 282 F.3d at 476. For these expenditures, they were convicted of laundering the proceeds of an illegal gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals vacated the money laundering convictions on the ground that "proceeds" in the statute means "profits" and that funds used to cover the overhead expenses of an illegal activity are not "proceeds" under that definition. 282 F.3d at 477. That decision is irreconcilable with the holding of the court below that "proceeds" are not limited to profits for purposes of the money laundering statute. In a more recent case involving the meaning of the word "proceeds" in the RICO forfeiture provision, 18 U.S.C. 1963(a)(3), the

Seventh Circuit, citing *Scialabba*, reaffirmed its view that "proceeds" means "profits." *United States* v. *Genova*, 333 F.3d 750, 761 (2003).[4]

2. The conflict over the definition of "proceeds" in the money laundering statute raises an issue of recurring importance that warrants the Court's review in an appropriate case. Indeed, the government petitioned for a writ of certiorari in *Scialabba* in order to obtain resolution of that issue. This Court, however, denied the petition. 537 U.S. 1071 (2002) (No. 02-442). At that time, the disagreement in the circuits over the meaning of the word "proceeds" in the money laundering statute was not as pronounced as now. In an appropriate case, therefore, resolution by this Court of the conflict on the meaning of the word "proceeds" would be warranted. But this case is not a suitable vehicle for review of that question.

First, as described above, see pp. 5-7, *supra*, petitioner did not challenge on appeal his *conviction* for conspiring to commit money laundering, a charge to

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[4] Contrary to petitioner's contention (Pet. 11-12), the decision below does not conflict with *United States* v. *Conley*, 37 F.3d 970 (3d Cir. 1994). There, one of the defendants contended on appeal that using the receipts of an illegal video poker operation to pay employees and to purchase additional machines was intrinsic to the gambling business and therefore could not constitute the separate crime of money laundering. Rejecting that claim, the court of appeals held that "the money, once collected from the poker machines, became 'proceeds of specified unlawful activity' within the meaning of the money laundering statute. Accordingly, any subsequent financial transaction involving these proceeds that promotes or furthers the illegal gambling business could form the basis of a charge of money laundering." *Id.* at 980. The result and reasoning in *Conley* are consistent with the Third Circuit's subsequent decision in *Grasso*, as the *Grasso* court specifically noted. 2004 WL 187620, at *7.

which he pleaded guilty. Nevertheless, he challenged the *forfeiture* order in the court of appeals on the ground that the financial transactions to which he admitted were insufficient to prove promotional money laundering. As the government argued below, that tactical decision presents a threshold procedural question, not addressed by the court of appeals, concerning whether petitioner's guilty plea prevents him from challenging the forfeiture order on the ground that his conduct was not a crime. In pleading guilty, petitioner knowingly and voluntarily admitted to making payments to winning bettors, and he admitted that those payments constituted money laundering specifically intended to promote his illegal gambling operation. That plea bars his current challenge. See *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (holding that pleading guilty admits guilt both of the discrete acts charged in the indictment and of the substantive crime).

Second, unlike *Scialabba* or *Grasso*, this case directly involves the forfeiture statute, 18 U.S.C. 982(a)(1) (Supp. I 2001), rather than the substantive money laundering statute, 18 U.S.C. 1956(a)(1). As long as petitioner's payments to winning bettors were "involved in" the money laundering offense within the meaning of 18 U.S.C. 982(a)(1) (Supp. I 2001), those payments need not themselves be "proceeds" within the meaning of the money laundering statute to be forfeitable. Thus, for example, even if only a portion of the payments constituted "proceeds," the payments were forfeitable in their entirety pursuant to 18 U.S.C. 982(a)(1) (Supp. I 2001). See, *e.g.*, *United States* v. *Real Prop. Known as 1700 Duncanville Road*, 90 F. Supp. 2d 737, 741 (N.D. Tex. 2000) (holding in civil forfeiture proceeding that real property was forfeitable in its entirety, even though only a portion of the money used

to buy the property was proceeds of food stamp fraud, because the purchase of the property was itself a money laundering offense), aff'd, 250 F.3d 738 (5th Cir. 2001) (Table); *United States* v. *One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 252 (E.D. Va. 1993) (holding in civil forfeiture proceeding that, where car payment is a money laundering offense, car is forfeitable in its entirety as "involved in" the money laundering offense even if legitimate funds were used to make other payments); see also, *e.g.*, *United States* v. *Tencer*, 107 F.3d 1120, 1134-1135 (5th Cir.) (upholding forfeiture of both legitimate and illegitimate funds as "involved in" money laundering, where legitimate funds "facilitated" money laundering offense), cert. denied, 522 U.S. 960 (1997). Accordingly, although the case was not argued or resolved on these grounds in the courts below, even assuming that "proceeds" in the money laundering statute means "profits," the payments to the winning bettors could still be found forfeitable.

Finally, although petitioner did raise the "'proceeds' means 'profits'" theory in the district court (Pet. Request for Findings of Fact & Rulings of Law 12-15, 20), in the court of appeals, petitioner did not press with clarity the position he now advocates, *i.e.*, that "proceeds" means "net profits." To the contrary, petitioner assured the court of appeals that his interpretation of the money laundering statute would not result in the statute's application only to profitable illegal enterprises, Pet. C.A. Br. 22, and specifically defined "proceeds" in a way more consistent with the view of the government than with that of the Seventh Circuit. *Id.* at 18 n.6 (defining "proceeds" as funds "derived from the already completed offense or a completed phase of an offense"). That may explain the lack of an extended

discussion of this issue by the court of appeals.[5] Because the court of appeals did pass on the meaning of "proceeds," Pet. App. 6-7, this Court's practice does not bar review. See, *e.g.*, *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002). But if the Court were to grant review here, it would be doing so without the benefit of a thorough discussion by the court below of the "proceeds" issue. *Cf. Grasso*, 2004 WL 1874620, at *4-*7.

3. If the Court decides to grant review in this case, the petition should be granted limited to the first question as framed in the government's opposition. The bulk of petitioner's arguments (Pet. 7-16) turn on whether "proceeds" in the money laundering statute means "profits," and that is the issue upon which the circuits are divided.

The petition's question presented, however, raises more generally the requirements for satisfying the promotional subsection of the money laundering statute. Pet. i. Consistent with that broader question, petitioner briefly raises at the end of his petition (Pet. 16-17) an attack on the sufficiency of the evidence to support his specific intent to promote the illegal gambling business. See 18 U.S.C. 1956(a)(1)(A)(i) (requiring "the intent to promote the carrying on of specified unlawful activity"). That question is framed as the second question presented in this brief.

Petitioner points to no conflict among the circuits with respect to the "specific intent to promote" requirement. Indeed, the Seventh Circuit has rejected

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[5] Petitioner directly argued that "proceeds" means "profits" for the first time in the court of appeals in his rehearing petition (see Pet. Petition for Reh'g & Suggestion for Reh'g En Banc 5-7), which the court of appeals summarily denied (Pet. App. 43-44).

such an argument on very similar facts. In *United States* v. *Febus*, 218 F.3d 784, cert. denied, 531 U.S. 1021 (2000), the Seventh Circuit held that a defendant's "payments to winning players promoted the bolita's continuing prosperity by maintaining and increasing the player's patronage" of the illegal lottery, and thus satisfied the money laundering statute's promotion requirement. *Id.* at 789-790.

Furthermore, the promotion issue is a factbound one not warranting this Court's review. Petitioner argues that "[p]ayments to winning gamblers are no more promotion than delivering a vehicle promotes a car sales business." Pet. 17. But, here, petitioner admitted (Pet. App. 15), and the district court found (*id.* at 32), that his payments to winning gamblers were intended to promote his illegal gambling business. Petitioner ran an ongoing gambling operation based on repeat customers. Petitioner had a set list of customers who were permitted to place bets. *Id.* at 16-17. As the district court found, "[n]othing makes an illegal gambling operation flourish more than the prompt payment of winners." *Id.* at 32. And, as the district court further observed, there is nothing fundamentally unfair about "view[ing] as money laundering the conduct of defendant that took the proceeds of his illegal business and used them to increase the popularity and viability of his criminal operation by paying his winners." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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